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BEFORE THE ARIZONA CORPORATION C

COMMISSIONERS

ROBERT "BOB" BURNS – Chairman
ANDY TOBIN
BOYD DUNN
SANDRA D. KENNEDY
JUSTIN OLSON

IN THE MATTER OF:

CONCORDIA FINANCING COMPANY, LTD, a/k/a
"CONCORDIA FINANCE,"

ER FINANCIAL & ADVISORY SERVICES, LLC,

LANCE MICHAEL BERSCH, and

DAVID JOHN WANZEK and LINDA WANZEK,
husband and wife.

Respondents

DOCKET NO. S-20906A-14-0063

DECISION NO. 77088OPINION AND ORDER

DATES OF PRE-HEARING CONFERENCES:

April 10, 2014, May 21, 2014, September 2, 2014,
February 11, 2015, March 16, 2015, April 2,
2015, April 28, 2015, May 7, 2015, July 16, 2015,
June 29, 2016, and November 18, 2016

DATES OF HEARING:

November 30, 2016, December 1, 2, 5, 6, 7, 8, 9,
12, 13, 15, 21, 22, and 23, 2016

PLACE OF HEARING:

Phoenix, Arizona

ADMINISTRATIVE LAW JUDGE:

Mark Preny

APPEARANCES:

Mr. Timothy Sabo, Snell & Wilmer, LLP, on
behalf of Respondents ER Financial & Advisory
Services, LLC, Lance Michael Bersch, David
John Wanzek and Linda Waznek;

Mr. Alan Baskin and Mr. David E. Wood, Baskin
Richards, PLC, on behalf of Respondents,
Concordia Financing Company, LTD, a/k/a
Concordia Finance; and

Mr. James D. Burgess and Mr. Paul Kitchin, Staff
Attorneys, Securities Division of the Arizona
Corporation Commission.

Arizona Corporation Commission

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BY THE COMMISSION:

On February 27, 2014, the Securities Division ("Division") of the Arizona Corporation Commission ("Commission") filed a Notice of Opportunity for Hearing Regarding Proposed Order to Cease and Desist, Order for Restitution, Order for Administrative Penalties, and Order for Other Affirmative Action ("Notice") against Concordia Financing Company, Ltd, a/k/a Concordia Finance ("Concordia"), ER Financial & Advisory Services, LLC ("ER Financial"), Lance Michael Bersch, and David John Wanzek and Linda Wanzek, husband and wife (collectively "Respondents"), in which the Division alleged multiple violations of the Arizona Securities Act ("Act") in connection with the offer and sale of securities in the form of investment contracts and promissory notes within or from Arizona.

The spouse of David John Wanzek, Linda Wanzek ("Respondent Spouse"), is joined in the action pursuant to A.R.S. § 44-2031(C) solely for the purpose of determining the liability of the marital community.

The Respondents were duly served with copies of the Notice.

On March 6, 2014, Respondents ER Financial, Lance Michael Bersch and David John Wanzek, filed a Request for Hearing. On March 14, 2014, Respondent Linda Wanzek filed a Request for Hearing.

On March 17, 2014, by Procedural Order, a pre-hearing conference was scheduled for April 10, 2014.

On March 26, 2014, Respondent Concordia filed a Request for Hearing.

On March 27, 2014, by Procedural Order, the pre-hearing conference scheduled for April 10, 2014, was affirmed, with notice issued to Respondent Concordia.

On April 4, 2014, Respondents ER Financial, Lance Michael Bersch, David John Wanzek, and Linda Wanzek (collectively the "ER Respondents") filed a Motion to Dismiss and Answer.

On April 9, 2014, Respondent Concordia filed an Answer.

On April 10, 2014, at the pre-hearing conference, the parties appeared through counsel and requested oral argument regarding the Motion to Dismiss. The parties further proposed a schedule for filing motions prior to oral argument.

On April 15, 2014, by Procedural Order, oral argument and a status conference were scheduled

1 to commence on May 21, 2014. It was further ordered that Respondent Concordia should file any
2 Motion to Dismiss by April 25, 2014, the Division should file its Response to the Motions to Dismiss
3 by May 9, 2014, and the Respondents should file any Reply by May 16, 2014.

4 On April 25, 2014, Respondent Concordia filed its Joinder to Motion to Dismiss of Respondents
5 ER Financial & Advisory Services, LLC, Lance Michael Bersh, David John Wanzek and Linda
6 Wanzek.

7 On May 5, 2014, Respondents ER Financial, Lance Michael Bersch, David John Wanzek, and
8 Linda Wanzek filed Acknowledgments of Possible Conflicts.

9 On May 9, 2014, the Division filed its Response to Motion to Dismiss by All Respondents.

10 On May 16, 2014, Respondents ER Financial, Lance Michael Bersch, David John Wanzek, and
11 Linda Wanzek filed their Reply in Support of Motion to Dismiss.

12 On May 21, 2014, oral argument and a status conference were held. The parties appeared
13 through counsel and oral argument was presented. The Motion to Dismiss was taken under advisement
14 and a schedule was proposed for the parties to submit supplemental citations.

15 On May 22, 2014, the Division filed its Supplemental Citation of Authorities.

16 On May 29, 2014, Respondents Concordia, ER Financial, Lance Michael Bersch, David John
17 Wanzek, and Linda Wanzek filed their Joint Supplemental Citation of Authorities.

18 On August 13, 2014, by Procedural Order, the Motion to Dismiss was denied. Accordingly, a
19 prehearing conference was scheduled on September 2, 2014.

20 On September 2, 2014, a pre-hearing conference was held. The parties appeared through
21 counsel. The scheduling of a hearing was discussed. Counsel for the ER Respondents stated they
22 would be filing a special action regarding the motion to dismiss. Counsel for the ER Respondents
23 requested that part of the hearing be held in the Lake Havasu area to accommodate witnesses for the
24 ER Respondents. This request was denied. After much discussion, a commencement date for the
25 hearing was agreed to by the parties.

26 On September 2, 2014, by Procedural Order, a hearing was scheduled to commence on May
27 11, 2015.

28 On January 5, 2015, the Division filed a Motion to Quash Discovery Demands by the ER

1 Respondents. The Division asserted that on November 24, 2014, the Division was served by the ER
2 Respondents with a "First Request for Production of Documents," a "First Set of Non-Uniform
3 Interrogatories," a "First Set of Requests for Admissions," a "Notice of 30(b)(6) Deposition," and a
4 "Notice of Deposition of Gary R. Clapper." The Division contended that the discovery demands by
5 the ER Respondents should be quashed because: discovery in this proceeding is governed by the
6 Administrative Procedure Act and the Commission's Rules, not the Arizona Rules of Civil Procedure;
7 the ER Respondents have not demonstrated a reasonable need for the information they demand; the
8 discovery demands include information and documents that are privileged and/or made confidential by
9 statute; and the discovery demands are unreasonably overbroad, unduly burdensome and oppressive.

10 On January 26, 2015, by Procedural Order, the Division's Motion to Quash Discovery Demands
11 was granted and the parties' exchange of witness lists and copies of exhibits was accelerated.

12 Later on January 26, 2015, the ER Respondents filed a Response to the Division's Motion to
13 Quash. The ER Respondents contended that: the Commission's Rules allow for broad discovery;
14 discovery is not barred by either the Administrative Procedure Act or statutory confidentiality; the ER
15 Respondents have a reasonable need for, and a constitutional right to, discovery; the requested
16 documents are not privileged or work product; and the discovery is not burdensome. The ER
17 Respondents also requested oral argument on the matter.

18 On January 27, 2015, by Procedural Order, oral argument was scheduled to be held on February
19 11, 2015. Also on January 27, 2015, the Division filed a Notice of Intent to File Reply in Support of
20 Motion to Quash Discovery Demands by the ER Respondents.

21 On February 3, 2015, the Division filed its Reply in Support of Motion to Quash Discovery
22 Demands by the ER Respondents. The Division argued that: the ER Respondents have not properly
23 sought discovery as provided under the Administrative Procedure Act and the Commission's Rules;
24 the Arizona Rules of Civil Procedure do not apply to discovery in this proceeding; prior procedural
25 orders and Commission decisions cited by the ER Respondents can be distinguished or otherwise fail
26 to support ordering the discovery sought; the ER Respondents have not demonstrated a reasonable need
27 for the discovery sought; many of the documents sought are protected work product; and the discovery
28 sought is confidential under A.R.S. § 44-2042(A).

1 On February 5, 2015, the Division filed a Notice of Errata Regarding its Reply in Support of
2 Motion to Quash Discovery Demands by the ER Respondents.

3 On February 10, 2015, the ER Respondents filed a Motion to Compel seeking discovery from
4 Respondent Concordia and requesting oral argument. The ER Respondents contended that the
5 Commission's Rules allow broad discovery; their requests for production of documents are specific
6 and not overbroad or burdensome; Concordia is the custodian of its own records; and a subpoena is not
7 required as Concordia is a party to this proceeding. The ER Respondents further attached an affidavit
8 from Respondent David John Wanzek responding to Concordia's communicated demand for a sworn
9 statement as to the ER Respondents' claims that they returned files to Concordia and that Mr. Bersch
10 and Mr. Wanzek were privy to attorney-client communications between Concordia and its counsel.

11 Also on February 10, 2015, counsel for the ER Respondents filed a Notice of Change of Law
12 Firm and Notice of Association with Counsel.

13 On February 11, 2015, oral argument was held on the Motion to Quash Discovery Demands.
14 The parties appeared through counsel. The Division and the ER Respondents presented oral argument
15 in favor of their respective positions on the ER Respondents' requests for discovery. In light of the
16 approaching commencement date of the hearing, the presiding Administrative Law Judge ruled from
17 the bench, finding that while the Administrative Procedure Act applies, fairness dictates that in this
18 case the Division more promptly provide the Respondents with certain documents in its possession.
19 Although the prior order quashing the ER Respondents' discovery requests was affirmed, the Division
20 was directed to disclose to the Respondents, by February 26, 2015, the contracts it intends to submit as
21 evidence of the 446 alleged investments. The Division contended that it may not have contracts for all
22 446 of the alleged investments and that the time required for redaction of this many documents might
23 make it difficult to meet the disclosure deadline. The Administrative Law Judge directed the Division
24 to prioritize those contracts involving the ER Respondents and permitted the Division to disclose by
25 March 12, 2015, any contracts which, after a good faith effort, were not ready by February 26, 2015.
26 Additionally, the Division was directed to disclose the transcript from the examination under oath of
27 Respondent Lance Michael Bersch, and the exhibits used therein, by February 26, 2015. The
28 documents ordered to be disclosed by February 26, 2015, were all documents Division counsel stated

1 he planned to use at hearing and, therefore, would have been subject to disclosure by the March 12,
2 2015 scheduled exchange of exhibits and witness lists.

3 On February 13, 2015, by Procedural Order, the Division was directed to disclose documents
4 to the Respondents as set forth by the Administrative Law Judge during oral argument on February 11,
5 2015.

6 On February 17, 2015, the ER Respondents filed an Application for Administrative Subpoena
7 requesting issuance of a subpoena for the deposition of anticipated Division witness Gary R. Clapper.
8 The ER Respondents also filed an Application for Administrative Subpoena requesting a subpoena for
9 the deposition of an Expert Accounting Witness to be designated by the Securities Division.

10 On March 6, 2015, the ER Respondents filed a Notice of Filing Affidavits of Service.

11 On March 9, 2015, by Procedural Order, a telephonic status conference was scheduled to
12 convene on March 16, 2015. The purpose of the status conference was to address whether the ER
13 Respondents continued to seek the production of further documents from Respondent Concordia in
14 light of the upcoming deadline for disclosure of exhibits and witness lists.

15 On March 11, 2015, Respondent Concordia filed its Motion to Extend Time to Exchange List
16 of Witnesses and Exhibits. Respondent Concordia requested an extension of the deadline to exchange
17 its List of Witnesses and Exhibits to March 20, 2015, based upon counsel for Concordia's upcoming
18 depositions and injunction hearings in matters unrelated to this case. In the motion, counsel for
19 Concordia noted that counsel for the ER Respondents had been contacted and would not agree to an
20 extension.

21 On March 12, 2015, the ER Respondents filed a Response in Opposition to Motion to Extend
22 Time to Exchange List of Witnesses and Exhibits. The ER Respondents opposed the motion because
23 the hearing was imminent and the information was necessary for their defense.

24 Later on March 12, 2015, Respondent Concordia filed its List of Witnesses and Exhibits. The
25 ER Respondents also filed a Notice of Service of List of Witnesses and Exhibits.

26 On March 16, 2015, a telephonic status conference was held. The parties appeared through
27 counsel. The Respondents agreed to work toward resolving the discovery issues raised in the ER
28 Respondents' Motion to Compel pending another status conference, and they further agreed to include

1 the Division in the discovery process. Also discussed was the Division's intent to amend the Notice to
2 include Linda Wanzek as a participant, as opposed to being joined solely for determining the liability
3 of the marital community, and the Division agreed to file a motion to amend the Notice. A schedule
4 was determined for motion practice and oral argument on the motion to quash.

5 On March 18, 2015, by Procedural Order, oral argument was scheduled for April 2, 2015, to
6 address the issue of the Division's motion to quash. A status conference regarding Concordia's
7 production of discovery was set for the same time.

8 On March 20, 2015, the Division filed a Motion to Quash Subpoenas, or in the Alternative,
9 Motion for a Procedural Order Limiting the Scope of Subpoenas. The Division contended that the
10 subpoenas should be quashed as they did not comply with the Administrative Procedure Act and the
11 Respondents had received the documents and information they claimed they needed. In the alternative,
12 the Division argued that the scope of the depositions should be limited to only that information the ER
13 Respondents specifically identified in their Applications for Subpoenas.

14 On March 27, 2015, the ER Respondents filed a Response to the Securities Division's Motion
15 to Quash Subpoenas. The ER Respondents contended that the subpoenas complied with the
16 Commission's Rules and the Administrative Procedure Act, that the ER Respondents had a reasonable
17 need for the depositions, and that the scope of the depositions should not be limited.

18 Also on March 27, 2015, the ER Respondents filed a copy of a letter sent to counsel for the
19 Division. The letter was identified as an objection to the Division's investigative subpoenas for
20 Respondents David and Linda Wanzek. The ER Respondents noted that the Division has contended in
21 the past that an Administrative Law Judge lacks the power to quash an investigative subpoena. The
22 ER Respondents stated that they filed a copy of the letter as a record of their objections.

23 On April 1, 2015, the Division filed its Reply in Support of Motion to Quash Subpoenas, or in
24 the Alternative, Motion for a Procedural Order Limiting the Scope of Subpoenas. The Division argued
25 that the subpoenas should be quashed because there was no finding in the record that the ER
26 Respondents had demonstrated a reasonable need for the deposition testimony, the applications for
27 subpoena were deficient and misleading as the ER Respondents had identified additional matters for
28 discovery beyond those stated in the applications, and the ER Respondents had received all the

1 documents and information they claimed to need. In the alternative, the Division argued that the scope
2 of the subpoenas should be limited based upon: the matters for which the ER Respondents had
3 established a reasonable need pursuant to the Administrative Procedure Act; the Division's deliberative
4 process and attorney-client privileges; and the Securities Act's confidentiality statute, A.R.S. § 44-
5 2042(A).

6 On April 2, 2015, a status conference and oral argument were held. The parties appeared
7 through counsel. Counsels for the Respondents agreed that Respondent Concordia was in the process
8 of preparing requested documents for disclosure to the ER Respondents. Respondent Concordia
9 asserted that some documents were likely in the possession of the Division, having been obtained from
10 the State of California following proceedings conducted there, and could be more easily obtained from
11 the Division. The Division asserted that the Securities Act's confidentiality statute applied, but noted
12 that it would make available supporting documentation used by the Division's accountant in creating
13 his Financial Data Summary.

14 The Division and the ER Respondents presented oral argument in favor of their respective
15 positions on the Division's Motion to Quash Subpoenas, or in the Alternative, Motion for a Procedural
16 Order Limiting the Scope of Subpoenas. Having considered the written and oral arguments presented
17 by the parties, as well as the statutes, rules and other authority cited therein, the presiding
18 Administrative Law Judge ruled from the bench and quashed the two subpoenas pursuant to A.A.C.
19 R14-3-109(O). The Administrative Law Judge found that the Administrative Procedure Act applies
20 and therefore, the ER Respondents must establish reasonable need for the information sought in the
21 depositions. In finding that the ER Respondents did not have reasonable need to proceed with the
22 depositions, the Administrative Law Judge noted: the numerous documents disclosed by the Division
23 as exhibits subsequent to the issuance of the subpoenas; the forthcoming disclosure by the Division of
24 the documents used by the accountant; the effect of these disclosed documents upon any current
25 reasonable need for the depositions regarding those six areas specifically identified in the ER
26 Respondents' Application for Subpoenas; and the schedule of the hearing, which would allow the ER
27 Respondents additional time before presenting their case, thereby overcoming any surprise that might
28 arise during the Division's presentation of its case in chief.

1 On April 3, 2015, by Procedural Order, the two subpoenas commanding attendance of the
2 Division witnesses for depositions were quashed, as decided at the April 2, 2015 status conference.
3 The Division was ordered to disclose, by April 15, 2015, the supporting documentation relied upon by
4 the Division's accountant in creating his Financial Data Summary. The Respondents were further
5 ordered to continue to work toward resolving outstanding discovery issues arising from the ER
6 Respondents' Motion to Compel.

7 On April 17, 2015, the ER Respondents filed a Motion to Continue Hearing due to health
8 conditions of Respondent Lance Michael Bersch. The ER Respondents requested that a status
9 conference be set in about six months with the ER Respondents to file a status report at least 21 days
10 before the status conference.

11 On April 22, 2015, by Procedural Order, a status conference was scheduled for April 28, 2015,
12 to address the ER Respondents' Motion to Continue Hearing.

13 On April 24, 2015, Respondent Concordia filed its Response to Motion to Continue.
14 Respondent Concordia had no objection to the continuance requested by the ER Respondents.

15 On April 24, 2015, the Division filed a Motion for Leave to File Amended Notice of
16 Opportunity for Hearing Regarding Proposed Order to Cease and Desist, Order for Restitution, Order
17 for Administrative Penalties, and Order for Other Affirmative Action. The Division sought leave to
18 amend its Notice of Opportunity for Hearing to provide greater detailed factual allegations and to
19 expound upon the fraud allegations in the original Notice.

20 Also on April 24, 2015, the Division filed its Response to the Motion to Continue Hearing. The
21 Division contended that the ER Respondents' Motion to Continue should be denied as the ER
22 Respondents had failed to provide sufficient information to justify a postponement due to illness.
23 However, the Division proposed a three month continuance of the hearing should leave be granted to
24 amend the Notice of Opportunity.

25 On April 28, 2015, a telephonic status conference was held. The parties appeared through
26 counsel. The ER Respondents' Motion to Continue and the Division's Motion for Leave to File
27 Amended Notice were both discussed. It was also noted that a hearing was scheduled to convene in
28 Superior Court on April 29, 2015, regarding a Motion to Stay Administrative Hearing filed by

1 Respondents Mr. Bersch, Mr. Wanzek and Mrs. Wanzek, pursuant to their Notice of Appeal of the final
2 judgment in the special action. A schedule was set for the filing of motions which would be addressed
3 at a future status conference. The parties agreed to vacate the scheduled hearing commencing on May
4 11, 2015.

5 On April 28, 2015, by Procedural Order, a status conference was scheduled to be held on May
6 7, 2015, to address the pending motions and schedule a hearing date. The Procedural Order further set
7 deadlines for the filing of responses and replies regarding the pending motions. The Procedural Order
8 also vacated the hearing scheduled to commence on May 11, 2015.

9 On April 29, 2015, the Division filed a Status Report Regarding the Superior Court Hearing on
10 Motion to Stay Administrative Case Pending Appeal. The Division reported that the Superior Court
11 hearing on the Motion to Stay Administrative Hearing was rescheduled for May 4, 2015.

12 On May 4, 2015, the ER Respondents filed a Reply in Support of Motion to Continue Hearing.
13 The ER Respondents provided additional information regarding the medical condition of Mr. Bersch,
14 including a letter from Mr. Bersch's doctor, who projected a recovery date for Mr. Bersch of July 15,
15 2015.

16 Also on May 4, 2015, the ER Respondents filed a Response to Securities Division's Motion for
17 Leave to File Amended Notice of Opportunity. The ER Respondents stated no objection to granting
18 the Division leave to amend the Notice, but noted that they would need additional time to address the
19 new allegations. The ER Respondents further stated that they would reserve: the right to challenge the
20 sufficiency of the new allegations by motion to dismiss; the right to include affirmative defenses, cross-
21 claims, counterclaims or third party claims with their answer to the amended notice; and the right to
22 review discovery related to the new allegations.

23 Also on May 4, 2015, the Division filed a Status Report Regarding the Superior Court Hearing
24 on Motion to Stay Administrative Case Pending Appeal. The Division noted that the Court denied the
25 Motion to Stay Administrative Hearing Pending Appeal. The Division stated, however, that the Court
26 issued a temporary 30-day stay that would apply only to an evidentiary hearing before the Commission
27 and not to the procedural conference set for May 7, 2015.

28 On May 5, 2015, Respondent Concordia filed its Response to Motion for Leave to File

1 Amended Notice of Opportunity, stating that it had no objection to the Division's motion.

2 On May 6, 2015, the Division filed a Motion to Take Official Notice of the Superior Court's
3 Minute Entry Denying Motion to Stay Administrative Case Pending Appeal. The Division attached as
4 an exhibit a copy of the Superior Court's May 4, 2015 minute entry in Maricopa County Superior Court
5 Case No. LC2014-000415-001. In denying the request for stay, the Court found that the Plaintiffs had
6 failed to demonstrate: (1) a likelihood of success on the merits, (2) that they would be irreparably
7 harmed if a stay was not granted, (3) that a stay would not injure the opposing party, and (4) that a stay
8 furthers the public interest. The Court ordered a temporary stay of thirty days, or until June 3, 2015,
9 to apply to the Court of Appeals for a stay of the administrative hearing.

10 On May 7, 2015, a telephonic status conference was held as scheduled. The parties appeared
11 through counsel. Without objection by the Respondents, the Administrative Law Judge took official
12 notice of the May 4, 2015 minute entry in Maricopa County Superior Court Case No. LC2014-000415-
13 001. The parties agreed that the temporary stay ordered by the Court did not preclude actions on the
14 pending motions and the scheduling of a hearing date after June 3, 2015. Without objection, the
15 Division's Motion for Leave to File Amended Notice of Opportunity was granted. Discussion was
16 held regarding the scheduling of the hearing and a new hearing date was agreed upon. Based upon the
17 new hearing date and the projected recovery time for Mr. Bersch, the ER Respondents acknowledged
18 that their April 17, 2015 Motion to Continue Hearing was moot. The ER Respondents also
19 acknowledged that they no longer had any discovery issues with regard to Respondent Concordia. The
20 parties acknowledged that, in light of the soon to be filed amended Notice, the ER Respondents would
21 reserve their prior arguments as set forth in their April 4, 2014 Motion to Dismiss and Answer

22 On May 7, 2015, by Procedural Order, a hearing was scheduled to commence on August 5,
23 2015.

24 On May 7, 2015, the Division filed an Amended Notice of Opportunity for Hearing Regarding
25 Proposed Order to Cease, and Desist, Order for Restitution, Order for Administrative Penalties and
26 Order for Other Affirmative Action ("Amended Notice").

27 On May 19, 2015, each of the four ER Respondents filed separate Requests for Hearing.

28 On May 21, 2015, Concordia filed a Request for Hearing.

1 On June 8, 2015, the ER Respondents filed a Motion to Dismiss and Answer to Amended Notice
2 of Opportunity ("ER Respondents' Motion and Amended Answer"). The ER Respondents sought
3 dismissal of the Division's fraud allegation that the ER Respondents failed to disclose to offerees and
4 investors that they were engaging in the conduct of an unlicensed escrow business by serving as a
5 Custodian, because the Commission has no jurisdiction to enforce escrow laws and the alleged
6 violation does not constitute securities fraud.

7 Also on June 8, 2015, Respondent Concordia filed its Answer to Amended Notice of
8 Opportunity for Hearing Regarding Proposed Order to Cease and Desist, Order for Restitution, Order
9 for Administrative Penalties, and Order for Other Affirmative Action

10 On June 16, 2015, the ER Respondents filed a Status Report regarding their Motion to Stay
11 filed with the Arizona Court of Appeals.

12 On June 22, 2015, the Division filed its Response to Motion to Dismiss by the ER Respondents.
13 The Division argued that jurisdiction was proper because they are seeking to enforce anti-fraud
14 provisions of the Securities Act. The Division cited *S.E.C. v. Levine*, 671 F. Supp. 2d 14, 28-29 (D.D.C.
15 2009), as precedent for finding securities fraud in an investment promoter's non-disclosure of acting
16 as an unlicensed escrow agent. The Division further asserted that the failure of the ER Respondents to
17 disclose their acting as an unlicensed escrow business constituted a material omission.

18 On June 30, 2015, the ER Respondents filed their Reply in Support of Motion to Dismiss. The
19 ER Respondents argued that *Levine* is non-controlling authority and factually distinguishable. The ER
20 Respondents further contended that materiality is a legal conclusion and that the Division has failed to
21 set forth factual allegations to support its theory.

22 On July 2, 2015, the Division filed a Motion for Order Requiring Respondent Concordia to file
23 an Amended Answer that Complies with A.A.C. R14-4-305. The Division contended that Concordia's
24 June 8, 2015 Answer failed to specifically admit or deny several of the allegations made in the
25 Amended Notice.

26 On July 6, 2015, Respondent Concordia filed a Stipulated Motion to Extend Time to Exchange
27 Supplemental List of Witnesses and Exhibits ("Stipulated Motion"). The Stipulated Motion stated that
28 counsel for the Division and counsel for the Respondents had conferred and agreed to extend the time

1 to exchange their Supplemental List of Witnesses and Exhibits to July 15, 2015.

2 On July 7, 2015, by Procedural Order, the ER Respondents' June 8, 2015 Motion to Dismiss
3 was denied because the Commission has jurisdiction over an allegation of fraud in connection with the
4 offer or sale of securities and the ER Respondents failed to establish that the Division would not be
5 entitled to relief under any state of facts susceptible of proof as to that portion of the Amended Notice
6 for which dismissal was sought.

7 On July 15, 2015, the ER Respondents filed a Notice of Service of Updated List of Witnesses
8 and Exhibits.

9 Also on July 15, 2015, Respondent Concordia filed a Motion for Settlement Conference.
10 Respondent Concordia asserted its belief that the allegations against it could be resolved short of
11 proceeding with a hearing.

12 Also on July 15, 2015, the Division filed a Motion for Leave to Present Telephonic Testimony.
13 The Division contended that good cause existed to allow the use of telephonic testimony at the hearing
14 as eleven of its witnesses were located in Tucson, Lake Havasu City, or outside Arizona. The Division
15 contended that telephonic testimony is permitted under the Commission's Rules of Practice and
16 Procedure and its use would not abridge the Respondents' due process rights.

17 On July 16, 2015, a telephonic procedural conference was held as scheduled. The parties
18 appeared through counsel. The ER Respondents provided a status report on their pending Motion to
19 Stay filed with the Arizona Court of Appeals. The parties discussed the merits of holding a settlement
20 conference and agreed upon a date. The parties discussed the Division's Motion for Leave to Present
21 Telephonic Testimony and a schedule was set for responses to the motion. Respondent Concordia
22 stated its intent to file an amended answer.

23 Also on July 16, 2015, by Procedural Order, Respondent Concordia's Motion for Settlement
24 Conference was granted. The Division's Motion for an Order Requiring Respondent Concordia to file
25 an Amended Answer was also granted. A settlement conference was set for July 23, 2015. Filing dates
26 were scheduled for Concordia's Amended Answer and for motions regarding requests for telephonic
27 testimony at the hearing.

28 On July 17, 2015, Respondent Concordia filed an Amended Answer to Amended Notice of

1 Opportunity for Hearing Regarding Proposed Order to Cease and Desist, Order for Restitution, Order
2 for Administrative Penalties, and Order for Other Affirmative Action ("Concordia's Amended
3 Answer").

4 On July 20, 2015, the ER Respondents filed a Motion to Allow Telephonic Testimony of
5 Witnesses. The ER Respondents requested that 67 of their listed witnesses be permitted to testify
6 telephonically as these witnesses live outside of the Phoenix area.

7 Also on July 20, 2015, the ER Respondents filed a Response to the Division's Motion for Leave
8 to Present Telephonic Testimony. The ER Respondents stated no objection to the telephonic testimony
9 of the Division's investor witnesses and no objection to the Division's witness from the California
10 Department of Business Oversight, who would be testifying to only the authentication of documents.
11 The ER Respondents specifically objected to the telephonic testimony of A. Craig Mason, Jr., a non-
12 investor expected to be subject to "substantial" cross-examination.

13 On July 21, 2015, Respondent Concordia filed its Response to the Division's Motion for Leave
14 to Present Telephonic Testimony, stating no objection to the motion.

15 Also on July 21, 2015, Respondent Concordia Filed an Updated List of Witnesses and Exhibits.

16 On July 23, 2015, a settlement conference was held.

17 On July 24, 2015, the Division filed its Response/Non-Opposition to the ER Respondents'
18 Motion to Allow Telephonic Testimony of Witnesses, and Reply in Support of Motion for Leave to
19 Present Telephonic Testimony. The Division contended that: good cause existed to allow the out-of-
20 state Mr. Mason to testify telephonically, the Commission could not subpoena him under A.A.C. R14-
21 3-109(O), it would be cost prohibitive to bring him in for an anticipated direct testimony of less than
22 fifteen minutes, and permitting him to testify telephonically comported with procedural due process.

23 On July 27, 2015, by Procedural Order, the Division's Motion for Leave to Present Telephonic
24 Testimony and the ER Respondents' Motion to Allow Telephonic Testimony of Witnesses were
25 granted. A telephonic procedural conference was scheduled to commence on July 29, 2015.

26 Also on July 27, 2015, the ER Respondents filed a Motion in Limine Number One: Objection
27 to Proposed Exhibits S-176(a) and S-176(b), a Motion in Limine Number Two: Objection to Proposed
28 Exhibit S-177, a Request for Public Broadcast of the Hearing, and a Motion for Clarification.

1 On July 28, 2015, the Division filed a Response to Motion for Settlement Conference and
2 Objection to Counsel's Unannounced Departure from Settlement Conference.

3 Also on July 28, 2015, the ER Respondents filed a Notice of Court of Appeals Order Staying
4 Proceedings in this Docket. The ER Respondents included a copy of the Order Granting Stay of
5 Administrative Hearing Pending Appeal, filed July 28, 2015, in Court of Appeals Division One No. 1
6 CA-CV 15-0340 (Maricopa County Superior Court No. LC2014-000415-001).

7 On July 29, 2015, by Procedural Order, the stay of administrative proceedings ordered by the
8 Arizona Court of Appeals was acknowledged. The telephonic procedural conference, scheduled to
9 commence on July 29, 2015, and the hearing, scheduled to commence on August 5, 2015, were both
10 vacated. The parties were ordered to file a joint written report regarding the status of the proceedings
11 in Court of Appeals Division One No. 1 CA-CV 15-0340 on November 2, 2015, and every ninety days
12 thereafter. The parties were further ordered to file a joint status report within five days upon a change
13 in status of the stay or a disposition of the appeal having been made by the Court of Appeals.

14 On November 2, 2015, the parties filed a Joint Status Report regarding the Status of the
15 Proceedings in the Arizona Court of Appeals. The parties asserted that the appeal filed by Mr. Bersch
16 and Mr. and Mrs. Wanzek of the entry of final judgment entered in Maricopa County Superior Court
17 No. LC2014-000415-001 had been fully briefed and that the parties had requested oral argument before
18 the Arizona Court of Appeals.

19 On February 1, 2016, the parties filed a Second Joint Status Report regarding the Status of the
20 Proceedings in the Arizona Court of Appeals. The parties asserted that the Arizona Court of Appeals
21 had granted the requests for oral argument but no date had been scheduled. The parties also asserted
22 further briefs were submitted to the Arizona Court of Appeals after the Arizona Attorney General was
23 permitted to file a brief as Amicus Curiae.

24 On April 29, 2016, the parties filed a Third Joint Status Report regarding the Status of the
25 Proceedings in the Arizona Court of Appeals. The parties stated that the matter had been fully briefed
26 and oral argument set for May 10, 2016.

27 On June 3, 2016, the Division filed a Notice of Lodging of Court of Appeals Decision. The
28 Division asserted that the Arizona Court of Appeals decision affirmed the judgment of the Superior

1 Court and vacated the Court of Appeals' stay of the proceedings.

2 Also on June 3, 2016, the Division filed a Motion for Status Conference to Schedule Hearing.
3 The Division contended that since the Arizona Court of Appeals has vacated its stay of these
4 proceedings, the proceedings should promptly resume.

5 On June 13, 2016, by Procedural Order, a status conference was scheduled to commence on
6 June 29, 2016.

7 On June 29, 2016, the status conference was held as scheduled. The parties appeared through
8 counsel. The scheduling of a hearing date was discussed. Also discussed were the status of pending
9 motions filed by the ER Respondents. Counsel for the ER Respondents acknowledged that the July
10 27, 2015 Motion for Clarification no longer needed to be addressed due to the prior stay of these
11 proceedings. The Administrative Law Judge stated that the July 27, 2015 Request for Public Broadcast
12 of the Hearing could not be acted upon as decisions regarding broadcasting are beyond the scope of his
13 authority. A deadline date for the Division to respond to the two July 27, 2015 motions in limine was
14 discussed. Counsel for the ER Respondents stated his intent to file a petition for review of the
15 Memorandum Decision in Arizona Court of Appeals Division One No. 1 CA-CV 15-0340.

16 On June 30, 2016, by Procedural Order, a hearing was scheduled to commence on November
17 28, 2016.

18 On August 1, 2016, the Division filed its Response to Motion in Limine Number One: Objection
19 to Proposed Exhibit 176(a) and Exhibit 176(b), and its Response to Motion in Limine Number Two:
20 Objection to Proposed Exhibit 177.

21 On August 12, 2016, the ER Respondents filed a Reply in Support of Motion in Limine Number
22 One and a Reply in Support of Motion in Limine Number Two.

23 On September 7, 2016, the ER Respondents filed a Motion to Continue Hearing. The ER
24 Respondents contended that this matter was more suitable for postponing rather than another matter
25 involving counsel for the Division.

26 On September 12, 2016, by Procedural Order, the ER Respondents' Motion in Limine Number
27 One: Objection to Proposed Exhibits S-176(a) and S-176(b) was denied. Further, the ER Respondents'
28 Motion in Limine Number Two: Objection to Proposed Exhibit S-177 was taken under advisement. In

1 addition, due to a change in the date of the Commission's November Open Meeting, the hearing was
2 scheduled to commence on November 30, 2016.

3 On September 20, 2016, the Division filed its Response to the ER Respondents' Motion to
4 Continue Hearing. The Division contended that good cause, pursuant to A.A.C. R14-3-109(Q), had
5 not been established to continue the hearing.

6 Also on September 20, 2016, the Division filed a Consent to Email Service.

7 On September 21, 2016, a Procedural Order was issued regarding the Division's Consent to
8 Email Service.

9 On September 22, 2016, by Procedural Order, the ER Respondents' Motion to Continue
10 Hearing was denied.

11 On September 26, 2016, Respondent Concordia filed a Stipulation to Extend the September 29,
12 2016 Deadline for Final Exchange of Witness Lists and Exhibits from September 29, 2016, to October
13 28, 2016. Concordia stated that the parties stipulated to the extension and good cause existed as
14 Concordia's accountant was in the process of gathering exhibits but could not proceed due to having
15 given birth on September 22, 2016.

16 On September 28, 2016, the ER Respondents filed a Consent to Email Service.

17 On September 30, 2016, a Procedural Order was issued approving the ER Respondents'
18 Consent to Email Service.

19 Also on September 30, 2016, by Procedural Order, an extension of the September 29, 2016
20 deadline for the exchange of supplemental or amended copies of witness lists and additional exhibits
21 was granted to October 28, 2016.

22 On October 31, 2016, Paul J. Roshka, Jr. and Craig M. Waugh of Polsinelli PC filed an
23 Application for Withdrawal of Counsel for ER Respondents ("Application to Withdraw"). Pursuant to
24 A.A.C. R14-3-104(E), Mr. Roshka and Mr. Waugh applied to withdraw as counsel for the ER
25 Respondents, who would continue to be represented by Timothy J. Sabo of Snell & Wilmer, L.L.P.

26 Also on October 31, 2016, Respondent Concordia filed a Motion to Dismiss Requested Relief
27 of Restitution and Administrative Penalties ("Motion to Dismiss Requested Relief").

28 On November 3, 2016, a Procedural Order was issued granting the Application for Withdrawal

1 of Counsel for ER Respondents filed by Paul J. Roshka, Jr. and Craig M. Waugh of Polsinelli PC.

2 On November 14, 2016, the Division filed a Response to Concordia's Motion to Dismiss
3 Requested Relief of Restitution and Administrative Penalties.

4 On November 16, 2016, by Procedural Order, a telephonic procedural conference was
5 scheduled for November 18, 2016.

6 On November 16, 2016, the Division filed a Notice of Lodging Order from Arizona Supreme
7 Court Denying Motion to Stay Administrative Hearing.

8 On November 18, 2016, the telephonic procedural conference was held as scheduled. The
9 parties appeared through counsel. Discussion was held regarding procedural issues and the hearing
10 schedule in light of the Petition for Review, from Court of Appeals Division One No. 1 CA-CV 15-
11 0340, appearing on the Arizona Supreme Court's calendar for December 13, 2016, and activities at the
12 Commission that may affect the scheduled hearing dates. Modification of the hearing schedule was
13 found to be necessary.

14 On November 18, 2016, by Procedural Order, the hearing dates were modified.

15 On November 18, 2016, Respondent Concordia filed a Notice Regarding Scheduling Conflict
16 from December 27-30, 2016. Concordia requested that no hearing dates be scheduled from December
17 27-30, 2016, as Concordia's out of state representatives would not be available.

18 On November 23, 2016, Respondent Concordia filed a Reply in Support of Motion to Dismiss
19 Requested Relief of Restitution and Administrative Penalties.

20 On November 28, 2016, by Procedural Order, Concordia's Motion to Dismiss Requested Relief
21 of Restitution and Administrative Penalties was denied.

22 On November 30, 2016, a full public hearing was commenced before a duly authorized
23 Administrative Law Judge of the Commission at its offices in Phoenix, Arizona. The parties appeared
24 through counsel. The hearing continued for 13 additional days, concluding on December 23, 2016. At
25 the conclusion of the hearing, the matter was taken under advisement pending the submission of closing
26 briefs and a Recommended Opinion and Order.

27 On December 2, 2016, the Division and the Respondents filed a Stipulation for Admission of
28 Certain Securities Division Exhibits.

1 On December 9, 2016, the Division and the Respondents filed a Stipulation to Facts Concerning
2 Certain Securities Division Exhibits. Also on December 9, 2016, the Division filed a Notice of Arizona
3 Addresses Listed on Sales Contract Exhibits.

4 On April 13, 2017, the Securities Division filed its Opening Post-Hearing Brief.

5 On May 12, 2017, Concordia filed a Stipulation to Extend the Time for Respondents to File
6 Their Answering Brief and the Division to File Its Reply Brief ("May 12, 2017 Stipulation"). Pursuant
7 to the May 12, 2017 Stipulation, the parties agreed to a fourteen-day extension for the Respondents to
8 file their Answering Brief and a corresponding fourteen-day extension for the Division to file its Reply
9 Brief.

10 On May 16, 2017, by Procedural Order, the May 12, 2017 Stipulation was granted.

11 On June 9, 2017, the ER Respondents filed a Stipulation ("June 9, 2017 Stipulation"). Pursuant
12 to the June 9, 2017 Stipulation, the parties agreed that the Respondents may file their Answering Briefs
13 on June 16, 2017. The June 9, 2017 Stipulation did not extend the filing deadline for the Division to
14 file its Reply Brief.

15 On June 12, 2017, by Procedural Order, the ER Respondents' June 9, 2017 Stipulation to extend
16 the Respondents' deadline to file their Answering Briefs to June 16, 2017, was granted.

17 On June 16, 2017, Concordia filed its Answering Brief to Securities Division's Opening Post-
18 Hearing Brief.

19 Also on June 16, 2017, the ER Respondents filed their Answering Brief.

20 On June 19, 2017, Concordia filed a Joinder to the Answering Brief filed by the ER
21 Respondents ("Concordia's Joinder"). Specifically, Concordia gave notice of its joinder in sections I
22 through VI, VIII, IX, XII(A) and XII(D) of the Answering Brief filed by the ER Respondents.

23 On July 26, 2017, the Division filed a Stipulation Regarding Post-Hearing Reply Brief Due
24 Date ("July 26, 2017 Stipulation"). Pursuant to the July 26, 2017 Stipulation, the parties stipulated that
25 the Division may file its Post-Hearing Reply Brief on or before August 15, 2017.

26 On July 27, 2017, by Procedural Order, the July 26, 2017 Stipulation was granted.

27 On August 15, 2017, the Division filed its Post-Hearing Reply Brief.

28 On January 12, 2018, Concordia filed notice of the death of Ken Crowder.

1 On August 1, 2018, counsel for the ER Respondents filed notice of the death of David Wanzek.

2 On October 25, 2018, Repondents ER Financial, Mr. Bersch, and Ms. Wanzek filed Notice of
3 Substitution of Counsel.

4 On October 26, 2018, the Division, ER Financial, Mr. Bersch, and Ms. Wanzek filed a
5 Stipulated Motion to Substitute Linda Wanzek, in Her Capacity as the Putative Personal Representative
6 of the Estate of David Wanzek, in place of the Late Respondent David Wanzek.

7 On October 30, 2018, by Procedural Order, Linda Wanzek, as the putative personal
8 representative of the Estate of David Wanzek, was substituted in place of the late Respondent David
9 Wanzek.

10 * * * * *

11 DISCUSSION

12 I. Brief Summary

13 This is an enforcement action brought against Respondents Concordia Financing Company,
14 Ltd., ER Financial and Advisory Services, LLC, Lance Michael Bersch, and David John Wanzek for
15 alleged violations of the Arizona Securities Act. The Division alleges that the Respondents offered or
16 sold unregistered securities, while not registered as dealers or salesmen, in violation of A.R.S. §§ 44-
17 1841 and 44-1842. Specifically, the Division alleges violations committed by Concordia through the
18 sale of seven promissory notes and 132 investment contracts, each consisting of a Servicing Agreement
19 and a Custodial Agreement. The Division alleges violations against ER Financial for having sold the
20 132 investment contracts. Mr. Bersch and Mr. Wanzek are alleged to be control persons of ER
21 Financial with Mr. Bersch personally responsible for 63 of the sales and Mr. Wanzek responsible for
22 53.

23 The Division further alleges fraud, in violation of A.R.S. § 44-1991(A), against ER Financial,
24 Mr. Bersch, and Mr. Wanzek for making false statements of fact that: 1) ER Financial was Concordia's
25 "Investor Relations Office;" 2) investments in Concordia would be liquid or the investor could get
26 investment funds back; 3) Concordia's investments were approved by a third party insurer; 4) the
27 Concordia investments were low risk and provided safety of principal; and 5) they monitored
28 Concordia's financial position. The Division also alleges fraud against ER Financial, Mr. Bersch, and

1 Mr. Wanzek for failure to disclose that: 1) they would receive a finder's fee if an offeree invested; 2)
2 they were acting as unlicensed escrow agents and an unlicensed escrow business through their duties
3 as Custodian; and 3) Concordia suffered losses and was in a poor financial condition since 2006.

4 Respondent Spouse, Linda Wanzek, is joined in this action solely for the purpose of determining
5 the liability of the marital community. Following the death of Mr. Wanzek, Linda Wanzek has been
6 substituted in his place as the putative personal representative of the estate of Mr. Wanzek.

7 The Division requests that the Respondents be ordered to pay restitution to 59 investors in a
8 total amount of over \$2.6 million. The Division further requests the issuance of a cease and desist
9 order against the Respondents and administrative penalties.

10 The Respondents contend that the Concordia investments were not securities or, alternatively,
11 were exempt from registration requirements. The Respondents raise numerous defenses, which they
12 argue require the dismissal of some or all of the Division's allegations, including: 1) the action should
13 be barred by the application of a statute of limitations or laches; 2) the Respondents were entitled to a
14 jury trial; and 3) the Respondents were entitled to civil discovery and their due process was violated in
15 the Division's presentation of exhibits and witnesses. The Respondents further argue that, if violations
16 are found against them, the Commission should not order restitution or administrative penalties.

17 **II. Testimony**

18 Christopher Kenneth Crowder

19 Mr. Crowder testified that Concordia was founded in 1994 by his father, Kenneth Crowder, and
20 incorporated in California.¹ Concordia's office was located in Ontario, California from 1999 through
21 2008.² From 1994 to 2008, Concordia was in the business of purchasing contracts for the sale of used
22 big rig trucks ("Conditional Sales Contracts" or "Contracts").³ Dealers would finance all or part of a
23 truck sale and then, if interested, Concordia would purchase the Conditional Sales Contracts from the
24 dealership.⁴

25 Mr. Crowder testified that he joined Concordia in September 1999, at a \$35,000 salary with no
26

27 ¹ Tr. at 66, 70, 540, 774-775.

² Tr. at 91.

³ Tr. at 70.

28 ⁴ Tr. at 71.

1 title or responsibilities other than learning the business.⁵ In 2000, Mr. Crowder was appointed secretary
2 of Concordia's Board of Directors and he became a member of the board on February 2, 2004, joining
3 the other board members, Mr. Wanzek, Mr. Bersch and Kenneth Crowder.⁶ As he learned the business,
4 Mr. Crowder became more involved, eventually being promoted to vice president on May 9, 2002, in
5 which capacity he oversaw operations including underwriting, collections and insurance.⁷ Mr.
6 Crowder testified that he has been president of Concordia since 2006, and started with a salary of
7 \$175,000.⁸ Neither Mr. Crowder nor Concordia are registered as securities salesmen or broker/dealers
8 in any state.⁹

9 Initially, Concordia's purchases were funded by Kenneth Crowder and his business partner.¹⁰
10 By September 1999, Concordia was receiving investor money and, by the time Mr. Crowder became
11 president, approximately 90-95% of the Conditional Sales Contracts purchased by the company were
12 funded by investor money.¹¹ Mr. Crowder testified that Concordia conducted due diligence before
13 purchasing truck financing contracts from a dealer, including running a credit check, getting an
14 Experian report and considering the particular circumstances of the truck driver to determine whether
15 he could make payments.¹² Mr. Crowder testified that credit checks were important to guard against
16 too many truck drivers who might default on their loan and that a credit check was conducted on every
17 truck driver.¹³ The truck drivers were typically first time owner/operators with bad credit who were
18 the second or third buyers of the big rig.¹⁴ The trucks served as collateral on the loan.¹⁵ Mr. Crowder
19 testified that it was potentially more difficult to repossess the trucks, as opposed to a used car purchased
20 by a consumer, because the trucks would travel all over the country.¹⁶ Defaulting truckers themselves
21 could move around a lot, making it cost prohibitive to pursue them to attempt to garnish their wages.¹⁷

22 ⁵ Tr. at 66-67, 538-539, 774, 848-849.

23 ⁶ Tr. at 69, 850-85; Exh. C-7 at C000084.

24 ⁷ Tr. at 67-68, 106-107, 775, 853-854; Exh. C-7 at C00082.

25 ⁸ Tr. at 68, 93, 539, 623, 1147.

26 ⁹ Tr. at 69.

27 ¹⁰ Tr. at 71.

28 ¹¹ Tr. at 72-73.

¹² Tr. at 73.

¹³ Tr. at 115-117, 132.

¹⁴ Tr. at 146.

¹⁵ Tr. at 147.

¹⁶ Tr. at 148.

¹⁷ Tr. at 149-150.

1 The truck drivers typically paid 30% interest under the Conditional Sales Contracts while
 2 Concordia paid investors between 10-12%, with Concordia making money, in part, from the difference
 3 between the interest it brought in versus the interest paid out.¹⁸ Mr. Crowder testified that Concordia's
 4 ability to make interest payments depended upon its ability to collect on the Conditional Sales
 5 Contracts.¹⁹ Too many defaults by truck drivers would result in Concordia being unable to make
 6 interest payments to investors, which is what happened by February 2009.²⁰ After the First Amendment
 7 to the Servicing Agreements went into effect, Concordia paid investors principal rather than interest,
 8 but these payments were also dependent upon the company's ability to collect on the truck loans.²¹

9 Mr. Crowder testified that Linda Wanzek is his cousin and that he knows Mr. Bersch through
 10 Linda's husband, David Wanzek.²² Mr. Crowder testified that he knew ER Financial to be an entity
 11 created by Mr. Wanzek and Mr. Bersch.²³ Mr. Bersch and Mr. Wanzek were Custodians for Servicing
 12 Agreements that Concordia offered to investors.²⁴ Mr. Bersch and Mr. Wanzek were also on
 13 Concordia's Board of Directors until they resigned sometime between 2004 to 2006.²⁵

14 To raise capital to purchase Conditional Sales Contracts, Concordia initially issued promissory
 15 notes, then Sale of Contracts and Servicing Agreements ("Servicing Agreements").²⁶ Mr. Crowder
 16 testified that, to his knowledge, all Servicing Agreements were accompanied by Custodial
 17 Agreements.²⁷ Mr. Crowder testified that the primary reason for the Custodian was to maintain titles
 18 that were assigned to the individual investor accounts.²⁸ According to Mr. Crowder, having a
 19 Custodian maintain the titles let Concordia get the titles back quickly for repossessions or insurance
 20 cases, let truckers get the titles quickly when they completed payments, and let the investors have
 21 access to their titles.²⁹

23 ¹⁸ Tr. at 147.

24 ¹⁹ Tr. at 116-117, 867.

25 ²⁰ Tr. at 115-116.

26 ²¹ Tr. at 116-117.

27 ²² Tr. at 73-74.

28 ²³ Tr. at 74.

29 ²⁴ Tr. at 75-76.

²⁵ Tr. at 76-77.

²⁶ Tr. at 77, 89.

²⁷ Tr. at 77, 89.

²⁸ Tr. at 90.

²⁹ Tr. at 90.

Mr. Crowder identified seven promissory notes issued by Concordia:

<u>Note Holder</u>	<u>Amount</u>	<u>Date</u>	<u>Interest</u>
1. FISSERV ISS & CO, FBO: Robert F. Edmonds	\$42,000	2/28/2007	10% ³⁰
2. Lincoln Trust Co. Custodian FBO: Robert F. Edmonds	\$208,000	1/10/2005	10% ³¹
3. John Santy	\$100,000	9/16/2002	12% ³²
4. Fiserv ISS & Co TTEE, FBO: Jack W. Guest	\$225,000	11/6/2006	10% ³³
5. Fiserv ISS & Co TTEE, FBO: Gary P. Kollars	\$53,109	11/6/2006	10% ³⁴
6. Lincoln Trust c/o Bonnie Ferris Spence	\$200,000	5/7/2005	12% ³⁵
7. Lincoln Trust Co. Custodian FBO: Bonnie Ferris Spence	\$200,000	3/7/2001	12% ³⁶

Mr. Crowder signed these promissory notes on behalf of Concordia.³⁷ Mr. Crowder testified that it was Concordia's regular business practice to deposit the proceeds from these promissory notes in Concordia's bank account at Chino Commercial Bank, or the bank that Concordia used prior to Chino Commercial Bank, and use the proceeds to purchase Conditional Sales Contracts.³⁸

Mr. Crowder testified that Concordia initially found investors to purchase Servicing Agreements and Custodial Agreements by contacting friends and family, then through the efforts of Mr. Wanzek and Mr. Bersch.³⁹ Mr. Crowder testified that he did not supervise Mr. Bersch, Mr. Wanzek or ER Financial in how they marketed Concordia's investments, and he was not aware of anyone else from Concordia supervising them.⁴⁰ Mr. Crowder testified that neither he nor anyone else at Concordia asked what Mr. Bersch, Mr. Wanzek and ER Financial told investors, and Mr. Crowder admitted that he did not have an interest in knowing what they told investors.⁴¹ Mr. Crowder did not approve documents used to market Concordia investments.⁴² Mr. Crowder testified that by the time he started

³⁰ Tr. at 78; Exh. S-35e.

³¹ Tr. at 79-81; Exh. S-35f.

³² Tr. at 82-83; Exh. S-87e.

³³ Tr. at 83-84; Exh. S-103a.

³⁴ Tr. at 84-85; Exh. S-105a.

³⁵ Tr. at 86-87; Exh. S-115f.

³⁶ Tr. at 87-89; Exh. S-115e.

³⁷ Tr. at 78, 80, 82, 83-84, 85, 86, 87; Exh. S-35e, S-35f.

³⁸ Tr. at 79, 81, 83, 84, 85, 87, 88-89.

³⁹ Tr. at 90-91.

⁴⁰ Tr. at 92-93, 129-130.

⁴¹ Tr. at 93.

⁴² Tr. at 104-109; Exhs. S-13h, S-110f, S-110g, S-110h, S-193.

1 working for Concordia, the Servicing Agreement and Custodial Agreement forms were already in place
2 and he had no reason to distrust the sales process or to be suspicious of what was being told to
3 investors.⁴³

4 Concordia provided blank copies of Servicing Agreements and Custodial Agreements to Mr.
5 Bersch.⁴⁴ Concordia would receive signed Servicing Agreements and Custodial Agreements from the
6 Custodian along with investors' checks, which would be deposited in Concordia's bank account at
7 Chino Commercial Bank or the predecessor bank used by Concordia.⁴⁵ An investor's money was
8 segregated in Concordia's software, but at the bank it was comingled in one account with money from
9 other investors and Concordia's own moneys, including proceeds from insurance claims, sales of
10 repossessions and loan payments from truck drivers on Conditional Sales Contracts.⁴⁶ Mr. Crowder
11 testified that Concordia was profitable in some years and those profits were mixed with investors' funds
12 in the bank account.⁴⁷ Mr. Crowder testified that while money went into a common bank account,
13 Concordia maintained separate account records for each investor.⁴⁸ Concordia used money in the bank
14 account to buy Conditional Sales Contracts and pay interest to investors, after moving it to a second
15 bank account that was used for accounts payable.⁴⁹ Mr. Crowder testified that Concordia did nothing
16 to determine an investor's financial status and the company did not use any documents to determine
17 whether an investor was an accredited investor.⁵⁰

18 Concordia would pledge truck titles to a particular investor by assigning them in Concordia's
19 software and sending a copy of the Conditional Sales Contract and truck title to the Custodian.⁵¹
20 Concordia serviced the contracts and made collections on behalf of the investors, who would receive a
21 monthly check unless they reinvested those funds, along with a monthly letter stating how much of
22 their investment was pledged with contracts and categorized for reinvestment and the amount not
23

24 ⁴³ Tr. at 856-857.

25 ⁴⁴ Tr. at 95.

26 ⁴⁵ Tr. at 96, 98, 130, 930.

27 ⁴⁶ Tr. at 98-100, 130.

28 ⁴⁷ Tr. at 101-102.

⁴⁸ Tr. at 777, 1870-1871.

⁴⁹ Tr. at 100, 130-131.

⁵⁰ Tr. at 96-98.

⁵¹ Tr. at 102, 930.

covered by the sum of contracts.⁵² Concordia was the lienholder, but the titles were assigned so that investors could request the titles from the Custodian and collect on their own at any time without Concordia being able to stop them.⁵³ A Schedule A, kept by the Custodian, listed each individual Conditional Sales Contract assigned to a particular Servicing Agreement.⁵⁴ Mr. Crowder testified that Mr. Bersch and Mr. Wanzek were aware of the process by which investors could take their titles and collect on their own.⁵⁵ Mr. Crowder testified that this was not a liquid process as an investor could not get his or her money back quickly.⁵⁶ Mr. Crowder testified that he could not recall there ever being an instance where an investor demanded and received a truck title.⁵⁷ Investors had no control over which Conditional Sales Contracts and titles were assigned to them.⁵⁸ Under the Servicing Agreements and Custodial Agreements, investors had no authority to direct Concordia's servicing of the truck financing contracts.⁵⁹ Mr. Crowder testified that Concordia investors could end the Custodial Agreement and become their own collectors.⁶⁰ However, under the terms of the Servicing Agreement, unless Concordia defaulted or gave written permission, which it could decline for any reason, an investor could not service his or her own contracts.⁶¹ In the event of a default by Concordia, an investor would have needed to obtain the title, gone to the Motor Vehicles Department to be inserted as lienholder on the title, contact the trucker and convince him or her to begin paying the investor rather than Concordia, a process that Mr. Crowder conceded would not be liquid in the investor's attempts to recoup the investment.⁶² Mr. Crowder also conceded that it would not be a liquid investment if an investor could not find a buyer and Concordia refused to buy the investor out.⁶³ At an examination under oath, Mr. Crowder testified that the Servicing Agreements were not liquid investments, nor did Concordia intend them to be as Concordia needed the investment funds to purchase truck contracts, service the

⁵² Tr. at 104, 930.

⁵³ Tr. at 103-104, 121.

⁵⁴ Tr. at 931.

⁵⁵ Tr. at 162; Exh. S-180 at 70-71.

⁵⁶ Tr. at 162-163.

⁵⁷ Tr. at 119-120, 124-125, 931.

⁵⁸ Tr. at 103.

⁵⁹ Tr. at 103-104.

⁶⁰ Tr. at 869.

⁶¹ Tr. at 134-136; *See, e.g.*, Exh. S-12a at § 6.3.

⁶² Tr. at 136-138, 869-870.

⁶³ Tr. at 145.

1 agreements, and pay for overhead.⁶⁴ Mr. Crowder testified that before 2008, investors were always
2 able to get their money back when they asked for it and he could not recall an instance where Concordia
3 ever enforced the five percent withholding pursuant to Section 7.1 of the Servicing Agreements.⁶⁵

4 Mr. Crowder testified that Concordia's payments to investors were made regardless of whether
5 the assigned truck contract defaulted.⁶⁶ Mr. Crowder further testified that custodial fees did not depend
6 on whether truckers paid or defaulted on the underlying truck contracts.⁶⁷ Prior to 2009, monthly
7 interest payments were made to investors based upon the rate stated in the Servicing Agreement,
8 regardless of whether the underlying truck sales contracts were performing.⁶⁸ Mr. Crowder testified
9 that when assigned truck contracts were not performing, Concordia paid investors from its own profits
10 from performing truck contracts.⁶⁹

11 At an examination under oath, Mr. Crowder testified that since 2002, Concordia's regular
12 business practice was to send company financial information to Mr. Bersch or Mr. Wanzek at least at
13 year's end.⁷⁰

14 Mr. Crowder testified that Concordia's statement of earnings for the year ending December 31,
15 2006, reported a net loss of approximately \$838,000.⁷¹ Regarding the statement of earnings, Mr.
16 Crowder testified that: Concordia's financials showed growth from 2005 to 2006; the \$838,000 loss
17 included many one-time expenses; Concordia increased its cash reserves to cover losses with money
18 that could have instead been disbursed and reported as income; Concordia reinvested accrued interest
19 that could have instead been disbursed and reported as income; and looking only at a profit and loss
20 statement does not present a full financial picture for a company or present relevant market events.⁷²
21 Mr. Crowder testified that 2007 was "flat" and "rocky" for Concordia and for the eighteen months from
22 the second half of 2007 through 2008 Concordia suffered heavy losses as trucker defaults increased.⁷³

23
24 ⁶⁴ Tr. at 158-159; Exh. S-165 at 70-71.

25 ⁶⁵ Tr. at 776.

26 ⁶⁶ Tr. at 167-168.

27 ⁶⁷ Tr. at 168.

28 ⁶⁸ Tr. at 168-169.

⁶⁹ Tr. at 170-172.

⁷⁰ Tr. at 174-175, 185; Exh. S-180 at 50.

⁷¹ Tr. at 176, 180; Exh. S-4g at ACC000524.

⁷² Tr. at 543, 882-889; Exh. ER-2 at C0000122, C0000124.

⁷³ Tr. at 179-182, 544.

1 A preliminary and unaudited statement of earnings showed that Concordia suffered a loss of \$1,055,451
 2 for the fiscal year ending December 31, 2007.⁷⁴ Mr. Crowder testified that an earning statement is less
 3 information than one would have from a full financial statement.⁷⁵ Mr. Crowder testified that, to his
 4 knowledge, the million dollar loss in 2007 was not disclosed by Concordia to investors who invested
 5 in 2008, and he did not know if this information was disclosed by Mr. Bersch or Mr. Wanzek.⁷⁶ In
 6 2007, Concordia acquired between \$1M to \$2M in Conditional Sales Contracts, with close to that
 7 amount in 2008.⁷⁷ Starting in about 2004, Concordia would limit the intake of new investments to
 8 periodic windows of opportunity, by which Mr. Bersch and Mr. Wanzek would abide.⁷⁸ Mr. Crowder
 9 testified that Concordia stopped taking new investments completely in 2008.⁷⁹ Mr. Crowder testified
 10 that he communicated to Mr. Bersch and Mr. Wanzek that Concordia was in financial trouble in 2008,
 11 and the company would take no more investors.⁸⁰ Mr. Crowder testified that on May 6, 2009, he sent
 12 a letter to all of Concordia's investors stating that the company had been "in a good position back in
 13 December of 2006."⁸¹

14 Mr. Crowder testified that after becoming president, he planned to change the direction of the
 15 company to bring in institutional investors, through mezzanine loans, as an alternative to the Servicing
 16 Agreements.⁸² Mr. Crowder testified that Concordia engaged Pacific Financial to help locate
 17 institutional investors and the plan for Concordia in 2006 was expansion, with the company leasing
 18 new office space in the expectation of growth.⁸³ An August 10, 2006 letter to investors referenced this
 19 financing plan and stated that Concordia's "profits are growing."⁸⁴ Mr. Crowder testified that one of
 20 these institutional groups, Fortress Investment Group ("Fortress"), did due diligence towards a deal
 21 and made a soft offer, but in 2008, Concordia chose to disengage from the deal because of changes in
 22

23 ⁷⁴ Tr. at 1873-1874; Exh. ER-2 at C000134.

24 ⁷⁵ Tr. at 1894.

25 ⁷⁶ Tr. at 1874.

26 ⁷⁷ Tr. at 544-545.

27 ⁷⁸ Tr. at 177-178.

28 ⁷⁹ Tr. at 176-177, 179, 1886.

⁸⁰ Tr. at 185-186.

⁸¹ Tr. at 182-183, 186-187; Exhs. S-2i, S-191.

⁸² Tr. at 545-546, 858.

⁸³ Tr. at 858, 883-884.

⁸⁴ Tr. at 547; Exh. S-2g.

1 the market.⁸⁵ Mr. Crowder testified that Concordia continued to accept investor money through ER
 2 Financial from 2006 through 2008.⁸⁶ Mr. Crowder testified that Concordia would not have provided a
 3 statement of earnings to investors.⁸⁷ Mr. Crowder testified that in 2008 Concordia was seeing
 4 “extremely large amounts of defaults, compounded by both the increase in diesel prices and the global
 5 economy starting to drop.”⁸⁸ Mr. Crowder testified that difficulties continued through 2008 and he was
 6 very concerned when he returned after being away from the company from August through
 7 September.⁸⁹ Mr. Crowder testified that in 2008, the role of Pacific Financial changed to a focus of
 8 crisis management assistance with the goal of maximizing the return for investors.⁹⁰

9 Concordia continued to take in new investors in 2007 and 2008. On January 19, 2007, the
 10 Lorraine Gayle Revocable Trust, with James Gayle and Lynn Caputo named as trustees, invested
 11 \$100,000 in a Servicing Agreement.⁹¹ A subsequent Second Amendment to Servicing Agreement
 12 regarding James Gayle, executed December 1, 2011, references a February 2, 2007 Servicing
 13 Agreement and reduces the investment from \$71,732.68 to \$16,732.68 after cancelling 55% of the
 14 balance as bad debt.⁹² On February 28, 2007, Robert F. Edmonds invested \$42,000 with Concordia in
 15 a promissory note.⁹³ On April 1, 2008, Theresa and Steven Patricola invested \$100,000 in a Servicing
 16 Agreement.⁹⁴ Mr. Crowder testified that Concordia accepted a check for another \$50,000 from
 17 investors Mr. and Mrs. Patricola in November 2008, but the person who received the check was
 18 terminated the day after and Mr. Crowder was unaware that Concordia had accepted this payment until
 19 approximately one month before the hearing.⁹⁵ On April 15, 2008, the Wagner Living Trust invested
 20

21 ⁸⁵ Tr. at 546-548. 859.

22 ⁸⁶ Tr. at 548-549.

23 ⁸⁷ Tr. at 551.

24 ⁸⁸ Tr. at 553.

25 ⁸⁹ Tr. at 553-554.

26 ⁹⁰ Tr. at 890.

27 ⁹¹ Tr. at 556; Exh. S-27a.

28 ⁹² Tr. at 556-557; Exh. S-28a.

⁹³ Tr. at 557; Exh. S-35e. The testimony elicited at hearing from Mr. Crowder indicates that Robert F. Edmonds also made a \$208,000 investment in 2007. Tr. at 556. However, Mr. Crowder stated that he was not sure of the actual date and he was not given an opportunity to review the document evidencing the transaction. *Id.* While Mr. Edmonds did make a \$208,000 investment in Concordia, this investment was made in a promissory note in 2005, scheduled to come due on January 10, 2007. Exh. S-35(f).

⁹⁴ Tr. at 558; Exh. S-18a.

⁹⁵ Tr. at 554-555, 558.

1 \$100,000 in a Servicing Agreement.⁹⁶ On May 30, 2008, the CJE Living Trust invested \$300,000 in a
 2 Servicing Agreement.⁹⁷ Mr. Crowder testified that as of May 2008, he realized he needed help with
 3 his health and he was not as focused on the business as much as he was after he became sober.⁹⁸ On
 4 June 15, 2008, the Bric Retirement Trust invested \$200,000 in a Servicing Agreement.⁹⁹ On June 30,
 5 2008, Peter and Debra Foti invested \$120,000 in a Servicing Agreement.¹⁰⁰ Also on June 30, 2008,
 6 Frank Foti invested \$100,000 in a Servicing Agreement.¹⁰¹ On July 18, 2008, the Shufflebotham
 7 Revocable Trust invested \$500,000 in a Servicing Agreement.¹⁰²

8 Mr. Crowder testified that he wrote a letter to investors, dated March 6, 2009, stating
 9 “Concordia has received many requests for withdrawal of funds,” but at the hearing he could not recall
 10 which investors requested withdrawal.¹⁰³ Mr. Crowder testified that he sent a form letter to investors,
 11 dated March 10, 2009, stating that an enclosed amendment to the Servicing Agreement would permit
 12 Concordia to return principal payments and enclosed the first payment for return of principal.¹⁰⁴ Mr.
 13 Crowder testified that the intention of the First Amendment was to treat investors equally and to
 14 maintain customers’ payments in the form of a return of capital, rather than as interest, so Concordia
 15 could avoid bankruptcy, which would have been worse for investors than the implementation of the
 16 First Amendment.¹⁰⁵ Mr. Crowder testified that some investors suggested that Concordia suspend
 17 payments, but Mr. Crowder knew that some investors relied on the regular checks for their cash flow.¹⁰⁶
 18 Mr. Crowder testified that Concordia continued to make monthly payments to investors for months
 19 while waiting for the First Amendments.¹⁰⁷ Mr. Crowder testified that when the letter was sent,
 20 investors had not yet agreed to the First Amendment and that the Servicing Agreement was still in full
 21 effect.¹⁰⁸ Under Sections 6.2 and 6.3 of the Servicing Agreement, Concordia was required to send

22 ⁹⁶ Tr. at 558; Exh. S-33a.

23 ⁹⁷ Tr. at 558-559; Exh. S-34a.

24 ⁹⁸ Tr. at 559.

25 ⁹⁹ Tr. at 560; Exh. S-40a. The testimony misstates the date of the investment as June 30, 2008. *Id.*

26 ¹⁰⁰ Tr. at 559; Exh. S-36a.

27 ¹⁰¹ Tr. at 560; Exh. S-38a.

28 ¹⁰² Tr. at 560-561; Exh. S-30a. The testimony misstates the date of the investment as June 18, 2008. *Id.*

¹⁰³ Tr. at 561; Exh. S-2i.

¹⁰⁴ Tr. at 562, 891; Exh. S-2j.

¹⁰⁵ Tr. at 891-893, 896.

¹⁰⁶ Tr. at 894.

¹⁰⁷ Tr. at 895-896.

¹⁰⁸ Tr. at 563.

1 monthly reports to investors along with the payment of interest due.¹⁰⁹ Under Section 12.8, the
 2 Servicing Agreement could only be amended by written agreement executed by the parties.¹¹⁰ Mr.
 3 Crowder testified that the First Amendment “got an overwhelming response” and that Concordia kept
 4 sending payments out to people, although the company ended up withholding payments to investors
 5 who had not signed the amendment.¹¹¹ Mr. Crowder testified that he was told by multiple counsel that
 6 preferential treatment should not be given after a super majority of the First Amendments had been
 7 signed.¹¹² Mr. Crowder testified that he could not recall any provision in the Servicing Agreement
 8 which allowed Concordia to change the terms of the agreement if a super majority of Concordia
 9 investors voted to do so.¹¹³ Mr. Crowder testified that there is no reference to a super majority in the
 10 Custodial Agreements, the First Amendment to the Servicing Agreement, or the Second Amendment
 11 to the Servicing Agreement.¹¹⁴ Mr. Crowder testified that he did not follow the terms of the contracts,
 12 but did what his lawyers told him.¹¹⁵

13 Mr. Crowder testified that the First Amendments were the same for all investors with changes
 14 made for investor names, the dates referenced for the Servicing Agreements, and the interest rate that
 15 the investor was being paid.¹¹⁶ Under the terms of the First Amendment, Sections 6.2 and 6.3 of the
 16 Servicing Agreement were deleted and replaced with a provision whereby Concordia would continue
 17 making monthly payments in the same amount as the interest payments, but these payments would now
 18 constitute repayment of principal.¹¹⁷ Mr. Crowder testified that Concordia did not give anything to the
 19 investors in exchange for signing the First Amendment, and that the First Amendment was presented
 20 to them as non-negotiable.¹¹⁸ Mr. Crowder testified that Concordia was unilaterally changing the terms
 21 of its arrangement with investors through the First Amendment.¹¹⁹ Mr. Crowder testified that 100
 22

23 ¹⁰⁹ Tr. at 563-564; Exh. S-2a.

24 ¹¹⁰ Tr. at 564; Exh. S-2a.

25 ¹¹¹ Tr. at 565, 569.

26 ¹¹² Tr. at 565-566, 569-570. Mr. Crowder testified that the super majority was reached once 70 or 75% of the investors had
 signed. Tr. at 932.

27 ¹¹³ Tr. at 579, 1876-1877.

28 ¹¹⁴ Tr. at 1877.

¹¹⁵ Tr. at 570, 577-578.

¹¹⁶ Tr. at 567.

¹¹⁷ Tr. at 567-568, 570; Exh. S-12c.

¹¹⁸ Tr. at 568.

¹¹⁹ Tr. at 578.

1 percent of the investors agreed to the First Amendment.¹²⁰ Mr. Crowder testified that the full 100
2 percent approval of the First Amendment was not achieved until Concordia started to withhold
3 investors' monthly checks.¹²¹ Mr. Crowder testified that Concordia knew that a number of the investors
4 depended upon the income stream provided by the monthly checks, and that the company used that
5 dependency to force the investors to sign the First Amendment under threat of withholding checks.¹²²

6 Mr. Crowder testified that under the terms of the First Amendment, other than deleting Sections
7 6.2 and 6.3, and recharacterizing payments as repayment of principal, the terms of the Servicing
8 Agreement were to remain in full force and effect.¹²³

9 Mr. Crowder testified that prior to offering the First Amendment to investors in 2009,
10 Concordia did not have the financial resources to continue paying investors interest payments in full
11 under the Servicing Agreements and, if investors had rejected the First Amendment, Concordia would
12 have likely filed for bankruptcy, leaving the investors worse off than under the First Amendment.¹²⁴

13 Mr. Crowder testified that, therefore, the investors did receive something in exchange for their
14 signatures on the First Amendment, namely, Concordia avoiding bankruptcy.¹²⁵

15 Mr. Crowder testified to sending a letter to investor Suellen LeMay stating that Concordia
16 would have to withhold further return of principal until the receipt of her First Amendment by April
17 24, although he could not recall if the letter was sent in 2009 or 2010.¹²⁶ Mr. Crowder testified to
18 sending a subsequent letter to Ms. LeMay stating that Concordia had not received her signed
19 amendment, signed amendments had been received from over 80% of Concordia's investors, and that
20 future payments to Ms. LeMay would be suspended until receipt of her signed amendment.¹²⁷ Mr.
21 Crowder testified that he met with one of Ms. LeMay's brothers, Paul Singleton, following either the
22 First or Second Amendment, and that he answered questions over the phone posed by another brother,
23 Verne Singleton.¹²⁸ Mr. Crowder testified that the Singletons requested information greatly exceeding

24 ¹²⁰ Tr. at 922, 1874.

25 ¹²¹ Tr. at 1875.

26 ¹²² Tr. at 1875-1876, 1900.

27 ¹²³ Tr. at 570; Exh. S-12c.

28 ¹²⁴ Tr. at 773.

¹²⁵ Tr. at 774.

¹²⁶ Tr. at 573-576; Exh. 2k.

¹²⁷ Tr. at 578-580; Exh. S-2l.

¹²⁸ Tr. at 910.

1 what would be on a financial statement, including the prices for every truck sold or repossessed, which
 2 changed daily.¹²⁹ Mr. Crowder testified that the Singletons demanded audited financials, which the
 3 company could not prudently afford at the time.¹³⁰ In an undated letter to one of the Singletons,
 4 referencing letters dated December 14 and 17, 2010, Mr. Crowder refused to provide detailed financial
 5 information that had been requested.¹³¹ Mr. Crowder testified that in his letter he attempted to respond
 6 to Mr. Singleton's questions and he referred Mr. Singleton to previously provided financial
 7 statements.¹³² Mr. Crowder testified that complying with Mr. Singleton's actual demands would have
 8 required writing down Concordia's entire daily operations.¹³³ Mr. Crowder testified that Paul Singleton
 9 suggested that Concordia find new investors to pay off the existing investors, which Mr. Crowder
 10 refused to do because the company was not in a financial position to pay on new investments.¹³⁴ Mr.
 11 Crowder testified that he received thanks from investors for his efforts to save their investments in
 12 Concordia.¹³⁵

13 Under Section 4.2 of the Servicing Agreement, if Concordia defaulted under the agreement, an
 14 investor could request the Custodian to release contracts and truck titles to the investor.¹³⁶ Mr. Crowder
 15 testified that Concordia would have allowed a release at any time if an investor wanted to take them,
 16 however this never happened.¹³⁷ Section 8 of the Servicing Agreement required, as a material
 17 condition, that Concordia be retained as the servicing agent of the contracts.¹³⁸ Section 6.3 of the
 18 Servicing Agreement made irrevocable the appointment of Concordia as servicing agent, which could
 19 only be modified by the prior written consent of Concordia.¹³⁹ Mr. Crowder testified that Concordia
 20 made its money as the servicing agent by keeping the difference between the 30 percent interest the
 21 truckers paid and the 10 or 12 percent paid to the investors.¹⁴⁰

23 ¹²⁹ Tr. at 911.

24 ¹³⁰ Tr. at 913.

25 ¹³¹ Tr. at 1879-1880; Exh. S-8n.

26 ¹³² Tr. at 1896.

27 ¹³³ Tr. at 1896-1897.

28 ¹³⁴ Tr. at 914-915.

¹³⁵ Tr. at 917-919; Exh. C-21 at C000597.

¹³⁶ Tr. at 582; Exh. S-2a.

¹³⁷ Tr. at 582-583.

¹³⁸ Tr. at 583; Exh. S-2a.

¹³⁹ Tr. at 584-585; Exh. S-2a.

¹⁴⁰ Tr. at 583-585.

1 Mr. Crowder testified that the First Amendment did not fix Concordia's problems, which
 2 worsened in 2009 as smaller and mid-sized trucking companies failed.¹⁴¹ Mr. Crowder testified that,
 3 again, Concordia considered its options, including bankruptcy, which would have left Concordia's \$10
 4 million portfolio worth pennies on the dollar.¹⁴² Mr. Crowder testified that he believed Concordia
 5 came up with a better plan than bankruptcy by maximizing the return for investors through the Second
 6 Amendment.¹⁴³ Mr. Crowder testified that, at the time, Concordia had a large number of defaulted
 7 loan contracts and Concordia was exploring other income options, as the company's quarterly
 8 newsletter told investors, by seeking to service other companies' portfolios, although this proved
 9 fruitless.¹⁴⁴

10 Mr. Crowder testified that the Second Amendment affected the Servicing Agreements by
 11 limiting principal return to 45% of the February 2009 balance with a debt forgiveness of 55%.¹⁴⁵ Mr.
 12 Crowder testified that Concordia sent out notices to investors about the company's financial situation
 13 prior to the Second Amendment.¹⁴⁶ Mr. Crowder testified that the Second Amendments were the same
 14 for all investors with changes made for investor names, the dates referenced for the Servicing
 15 Agreement, and the amount of the investors' investment that was being reduced by 55% as bad debt.¹⁴⁷
 16 Mr. Crowder testified that investors agreed to the restructuring of principal to avoid the real possibility
 17 of a lower recovery in bankruptcy and that Concordia has fulfilled its return of principal obligations
 18 under the Second Amendment.¹⁴⁸ Mr. Crowder testified that an order to repay the \$2 million allegedly
 19 owed would force Concordia into bankruptcy.¹⁴⁹ Under Section 11 of the Second Amendment, an
 20 investor "releases Concordia, its officers, directors, agents and employees, from any and all liability
 21 under the original Agreement except as herein amended."¹⁵⁰ Mr. Crowder testified that Concordia did
 22 not give the investors anything in exchange for signing the Second Amendment.¹⁵¹ Mr. Crowder

23 ¹⁴¹ Tr. at 902.

24 ¹⁴² Tr. at 904-905.

25 ¹⁴³ Tr. at 905-906.

26 ¹⁴⁴ Tr. at 906-907.

27 ¹⁴⁵ Tr. at 908-909.

28 ¹⁴⁶ Tr. at 909.

¹⁴⁷ Tr. at 590.

¹⁴⁸ Tr. at 924.

¹⁴⁹ Tr. at 927.

¹⁵⁰ Tr. at 586-587; Exh. S-12d.

¹⁵¹ Tr. at 587.

1 testified that Concordia wanted Section 11 in the Second Amendment as protection from investors
 2 taking legal action against Concordia.¹⁵² Mr. Crowder testified that prior to issuing the Second
 3 Amendments, Concordia communicated with investors and was willing to listen to suggestions as to
 4 what route the company should go, which the majority said was the Second Amendment.¹⁵³ Mr.
 5 Crowder testified that Concordia was not willing to negotiate the Second Amendment with those
 6 investors who did not want to sign it.¹⁵⁴ Mr. Crowder testified that Concordia's position is that the
 7 Second Amendment terminated Concordia's obligation to repay its investors more than 45% of the
 8 principal balance owed them on February 1, 2009.¹⁵⁵ Mr. Crowder testified that all but two of the
 9 investors have been repaid their 45% and there are no other investors who have not signed the Second
 10 Amendment.¹⁵⁶ Mr. Crowder testified that under the Second Amendment, Concordia took on the
 11 additional duty of becoming Custodian of the Servicing Agreements at no cost to the investors.¹⁵⁷ Mr.
 12 Crowder testified that once a super majority of investors had signed the Second Amendment, Concordia
 13 withheld checks for the other 20 percent until they also signed.¹⁵⁸

14 Mr. Crowder testified that prior to offering the Second Amendment to investors in 2011,
 15 Concordia did not have the financial resources to continue paying investors interest payments in full
 16 under the First Amendment and, if investors had rejected the Second Amendment, Concordia would
 17 have likely filed for bankruptcy, leaving the investors worse off than under the Second Amendment.¹⁵⁹
 18 Mr. Crowder testified that, therefore, the investors did receive something in exchange for their
 19 signatures on the Second Amendment, namely, Concordia avoiding bankruptcy.¹⁶⁰ Mr. Crowder
 20 testified that Concordia continued to receive payments on truck contracts after the Second
 21 Amendment.¹⁶¹ Mr. Crowder testified that the moneys Concordia received in 2011, 2012, and 2013
 22 were much smaller than it had received in the past.¹⁶² Mr. Crowder testified that Concordia's portfolio

23 ¹⁵² Tr. at 587.

24 ¹⁵³ Tr. at 590-591.

25 ¹⁵⁴ Tr. at 591.

26 ¹⁵⁵ Tr. at 593.

27 ¹⁵⁶ Tr. at 594-595, 922-923.

28 ¹⁵⁷ Tr. at 919.

¹⁵⁸ Tr. at 1875.

¹⁵⁹ Tr. at 774.

¹⁶⁰ Tr. at 774.

¹⁶¹ Tr. at 1880-1881.

¹⁶² Tr. at 1890.

1 peaked at just over \$30 million and today it is somewhere between \$2.5-2.6 million.¹⁶³

2 Mr. Crowder testified that Mr. Bersch, Mr. Wanzek, and ER Financial assisted Concordia with
3 the amendments by providing contact information, answering investor questions in their office, and
4 forwarding the amendments to Concordia.¹⁶⁴ Mr. Crowder testified that ER Financial returned the
5 contracts, vehicle titles and assignments of titles to Concordia.¹⁶⁵ Mr. Crowder testified that in 2010
6 Concordia instructed ER Financial to return the vehicle titles to change the address on the titles.¹⁶⁶
7 Under the terms of the Servicing Agreement, the Custodian is to hold the contracts unless: returned to
8 Concordia because the contract is paid in full or incurs a default, pursuant to Section 4.1; released to
9 the investors upon a default by Concordia, pursuant to Section 4.2; or released under the written
10 permission of both Concordia and the investor.¹⁶⁷ Mr. Crowder testified that Concordia instructed the
11 return of the titles to Concordia in 2010 to correct the addresses after Concordia changed offices.¹⁶⁸
12 Mr. Crowder testified that Concordia did not ask permission from the investors for ER Financial to do
13 this and he did not recall any investor giving written permission for the return of the titles to
14 Concordia.¹⁶⁹

15 Mr. Crowder testified that, as custodian of records for Concordia, he received a subpoena duces
16 tecum from the State of California Department of Corporations served on Concordia.¹⁷⁰ Mr. Crowder
17 testified that he worked to assemble the requested information and worked with counsel, Mr. Millar,
18 who prepared a response addressing the 31 categories of documents requested in the subpoena.¹⁷¹ Mr.
19 Crowder testified that the documents pulled in response to the subpoena were prepared in the ordinary
20 course of Concordia's business and maintained pursuant to Concordia's regular business practices.¹⁷²

21 Mr. Crowder testified that he did not know whether Kansas City Life Insurance ("Kansas City
22 Life") approved Concordia's Servicing Agreements after conducting due diligence, but Concordia
23

24 ¹⁶³ Tr. at 1890-1891.

¹⁶⁴ Tr. at 595.

25 ¹⁶⁵ Tr. at 595.

¹⁶⁶ Tr. at 597-598; Exh. S-161.

26 ¹⁶⁷ Tr. at 599; Exh. S-2a.

¹⁶⁸ Tr. at 598, 600.

27 ¹⁶⁹ Tr. at 600.

¹⁷⁰ Tr. at 600; Exh. S-162.

28 ¹⁷¹ Tr. at 602-603.

¹⁷² Tr. at 603-605.

1 never paid premiums to Kansas City Life and Mr. Crowder had no knowledge of an insurance policy
 2 being issued.¹⁷³ Mr. Crowder testified that Concordia had a document, titled a draft selling agreement,
 3 signed by Kenneth Crowder, Mr. Wanzek, and the president of Sunset Financial Services, Inc. ("Sunset
 4 Financial"), a subsidiary of Kansas City Life.¹⁷⁴

5 Mr. Crowder testified that he never represented to Mr. Bersch or Mr. Wanzek that the Servicing
 6 Agreements were not securities.¹⁷⁵ Mr. Crowder testified that he was not aware of his father or any
 7 attorney for Concordia ever representing to Mr. Bersch or Mr. Wanzek that the Servicing Agreements
 8 were not securities, though it could have happened before Mr. Crowder joined the company.¹⁷⁶ Mr.
 9 Crowder testified that Concordia did not register the Servicing Agreements as securities because
 10 Concordia thought they were not securities.¹⁷⁷ For fiscal years 2004 through 2008, Concordia paid
 11 finder's fees to ER Financial totaling \$565,425.¹⁷⁸ Mr. Crowder testified that the finder's fee
 12 arrangement with ER Financial was in place before he joined Concordia and his role was to cut a check
 13 when the paperwork for new investors came in.¹⁷⁹ From fiscal year 2004 through January 2009,
 14 Concordia paid ER Financial custodial fees totaling \$2,529,337.¹⁸⁰ Concordia also paid custodial fees
 15 to Sunset Financial from 2004 through 2009.¹⁸¹ Mr. Crowder testified that finder's fees and custodial
 16 fees paid to Sunset Financial would have been calculated as a percentage of an investor's investment.¹⁸²
 17 Mr. Crowder testified that this indicated that some investments in the Servicing Agreements were made
 18 through Sunset Financial pursuant to the selling agreement.¹⁸³ Concordia also paid custodial fees to
 19 Chino Commercial Bank from 2004 through 2008.¹⁸⁴

20 Mr. Crowder testified that Mr. Bersch and Mr. Wanzek performed internal accounting work
 21

22 ¹⁷³ Tr. at 605-611; Exh. S-165 at 62-63.

23 ¹⁷⁴ Tr. at 633-638; Exh. ER-12.

24 ¹⁷⁵ Tr. at 611-612.

25 ¹⁷⁶ Tr. at 612-613, 775-776.

26 ¹⁷⁷ Tr. at 777.

27 ¹⁷⁸ Tr. at 618-621; Exh. S-169.

28 ¹⁷⁹ Tr. at 1869-1870.

¹⁸⁰ Tr. at 621-622; Exh. S-169. Linda Wanzek received \$493,158 in custodial fees during this time period. Tr. at 622; Exh. S-169.

¹⁸¹ Tr. at 771; Exh. S-169 at ACC011409-ACC0011410.

¹⁸² Tr. at 1146.

¹⁸³ Tr. at 771; Exh. ER-12.

¹⁸⁴ Tr. at 771-772; Exh. S-169 at ACC011409-ACC0011410.

1 early in Concordia's history, before the company's own accountants took over.¹⁸⁵ Mr. Crowder
2 testified that Mr. Bersch and Mr. Wanzek never did payroll for Concordia.¹⁸⁶

3 Mr. Crowder testified that he took a reduced salary of approximately \$140,000 in 2009 and
4 2010, another pay cut to \$125,000 in 2012, and then returned his salary to \$175,000 at the end of
5 2013.¹⁸⁷ Mr. Crowder testified that he raised his pay after releasing two employees and assuming the
6 duty of directly overseeing underwriting, and that he had not had a raise in ten years.¹⁸⁸ Mr. Crowder
7 testified that Concordia employees' pay rates had been frozen but they received a ten percent raise
8 when Mr. Crowder restored his salary.¹⁸⁹ Mr. Crowder testified that nothing extra was given to the
9 investors.¹⁹⁰ Mr. Crowder testified that Concordia cut costs by instituting across the board salary and
10 wage decreases and eventually let go over half its employees.¹⁹¹

11 Mr. Crowder testified that Concordia had approximately 140 investors in the Servicing
12 Agreements, that Concordia had a website since approximately 2004 or 2005, and the Servicing
13 Agreements were also known to Sunset Financial, Pacific Financial, Fortress, Chino Commercial Bank,
14 Concordia's CPAs, and truck dealers.¹⁹²

15 Mr. Crowder testified that someone with Sunset Financial had sold Concordia Servicing
16 Agreements.¹⁹³ Mr. Crowder testified that a representative of Sunset Financial, Kim Kirkman, met
17 with Ken Crowder while conducting due diligence for Sunset Financial over a period of a few days in
18 early 2000.¹⁹⁴ Mr. Crowder testified that after Mr. Kirkman's visit, Sunset Financial entered into an
19 agreement, dated June 1, 2000, to sell Servicing Agreements.¹⁹⁵ Mr. Crowder testified that while
20 Kansas City Life and Sunset Financial did not insure the Servicing Agreements, he believed that Sunset
21 Financial approved them for sale.¹⁹⁶ Mr. Crowder testified that he had contact with Sunset Financial
22

23 ¹⁸⁵ Tr. at 772.

24 ¹⁸⁶ Tr. at 772.

25 ¹⁸⁷ Tr. at 624-625.

26 ¹⁸⁸ Tr. at 898.

27 ¹⁸⁹ Tr. at 625.

28 ¹⁹⁰ Tr. at 625-626.

¹⁹¹ Tr. at 897.

¹⁹² Tr. at 778-779.

¹⁹³ Tr. at 860.

¹⁹⁴ Tr. at 860-861.

¹⁹⁵ Tr. at 862; Exh. ER-12.

¹⁹⁶ Tr. at 863-864.

1 broker Randy Albers, who sold Servicing Agreements in Phoenix, Arizona.¹⁹⁷ Mr. Crowder testified
 2 that Concordia paid custodial fees to Sunset Financial.¹⁹⁸ Mr. Crowder testified that Chino Commercial
 3 Bank also sold Servicing Agreements and received custodial fees.¹⁹⁹

4 Mr. Crowder testified that Concordia liquidated the investment of Mr. Luhr's mother pursuant
 5 to his request.²⁰⁰ Mr. Crowder testified that Concordia allowed multiple other investors to withdraw
 6 their funds without Concordia demanding to buy back the loan contracts at 95% or deducting interest
 7 paid.²⁰¹ Mr. Crowder testified that the economy changed things, making it difficult for drivers to make
 8 their payments due to rising fuel prices and fewer available hauls.²⁰² Mr. Crowder testified that three
 9 competitors of Concordia, American General, which was a division of AIG, Equilease, and Cobalt went
 10 out of business in 2006 or 2007.²⁰³ Mr. Crowder testified that he initially considered these companies
 11 closing to be good news, creating a larger pool of better applicants for Concordia.²⁰⁴ Mr. Crowder
 12 testified that the problems experienced by the truckers led to higher repossession rates and low recovery
 13 rates from 2008 to 2011.²⁰⁵ Mr. Crowder testified that the resale price of repossessed vehicles was
 14 limited by a glut of used vehicles on the market and low demand.²⁰⁶

15 Mr. Crowder testified that Concordia returned approximately 90% of investors' principal, with
 16 the vast majority of investors receiving over 100% of their investment, including Ms. LeMay.²⁰⁷ Mr.
 17 Crowder testified that 100% of Concordia investors signed the First Amendment and the Second was
 18 signed by all but two investors, with whom the company had lost contact.²⁰⁸ Mr. Crowder testified that
 19 the Division initially asserted that Concordia owed \$3.9 million to investors, but, after Concordia's
 20 representatives met with the Division and provided documentation, that figure was lowered to under
 21 10% of what was invested throughout Concordia's history.²⁰⁹

22 ¹⁹⁷ Tr. at 864.

23 ¹⁹⁸ Tr. at 865.

24 ¹⁹⁹ Tr. at 865-866.

25 ²⁰⁰ Tr. at 870-871.

26 ²⁰¹ Tr. at 871.

27 ²⁰² Tr. at 871-872, 875.

28 ²⁰³ Tr. at 872-873.

²⁰⁴ Tr. at 873-874.

²⁰⁵ Tr. at 875, 877.

²⁰⁶ Tr. at 877-878.

²⁰⁷ Tr. at 922.

²⁰⁸ Tr. at 923.

²⁰⁹ Tr. at 923-924.

1 Mr. Crowder testified that Concordia had not sought funds from investors since 2009.²¹⁰ Mr.
 2 Crowder testified that since 2009, Concordia's truck loan portfolio has not been "stellar," that it was
 3 "in dramatic free fall" and that by 2011 it started to level off.²¹¹ Mr. Crowder testified that Concordia
 4 worked with others to create a term sheet ("Term Sheet"), dated October 3, 2012, for a new entity,
 5 Concordia Funding I, LLC ("Concordia Funding"), for a \$10 million fund raise through the sale of
 6 secured notes and shares of Concordia Funding.²¹² Mr. Crowder testified that the Term Sheet was
 7 never finalized past a draft stage.²¹³ Under the terms of the offering, Concordia Funding would be a
 8 separate corporate entity used to acquire and hold the conditional installment sales contracts originated
 9 and serviced by Concordia.²¹⁴ The investment purpose of the offering was that Concordia would use
 10 the net proceeds to purchase class 8 truck sales contracts.²¹⁵ Concordia was to originate and service
 11 the sales contracts in exchange for an origination fee and monthly servicing fee, pursuant to an
 12 agreement with Concordia Funding, as well as maintain and hold all documents and titles relating to
 13 the sales contract for a custodial fee, pursuant to a custodial agreement with Concordia Funding.²¹⁶
 14 Under the terms of the offering, qualified investors were required to be accredited investors, as defined
 15 by Rule 501(a) of Regulation D under the Securities Act of 1933, and investments should be considered
 16 illiquid.²¹⁷

17 Mr. Crowder testified that Concordia, with the assistance of professional advisors, participated
 18 in the creation of a Summary Information Memorandum ("Memorandum"), dated July 2010, for
 19 Concordia Funding.²¹⁸ Mr. Crowder testified that the Memorandum was never finalized past a draft
 20 stage.²¹⁹ The Memorandum stated that it was the confidential business information of Concordia.²²⁰
 21 The Memorandum stated that Concordia will be the manager of Concordia Funding.²²¹ The
 22

23 ²¹⁰ Tr. at 1155-1156, 1856.

24 ²¹¹ Tr. at 1156.

25 ²¹² Tr. at 1856, 1899; Exh. ER-15 at ACC011555.

26 ²¹³ Tr. at 1899.

27 ²¹⁴ Tr. at 1857; Exh. ER-15 at ACC011555.

28 ²¹⁵ Tr. at 1857, 1901; Exh. ER-15 at ACC011555.

²¹⁶ Tr. at 1857-1858; Exh. ER-15 at ACC011556-ACC011557.

²¹⁷ Tr. at 1858; Exh. ER-15 at ACC011556-ACC011557.

²¹⁸ Tr. at 1859, 1899; Exh. ER-15 at ACC011558.

²¹⁹ Tr. at 1899.

²²⁰ Tr. at 1859-1860; Exh. ER-15 at ACC011558.

²²¹ Tr. at 1860; Exh. ER-15 at ACC011568.

Memorandum further stated that Concordia's role would be to originate, underwrite and service the contract portfolio.²²² The Memorandum stated that Concordia, like every industry, was caught off guard by the current economic downturn, but changes to the company's underwriting process "have produced a portfolio with stellar performance."²²³ The Memorandum stated that an increasing demand for trucking services "provides Concordia with an excellent opportunity to continue its growth strategy profitably."²²⁴ Mr. Crowder testified that in July 2010, there had been a large exit of Concordia competitors and, therefore, Concordia saw an opportunity to fill the demand for financing.²²⁵ The Memorandum stated that proceeds from the \$10 million fund raise will be used to purchase contracts to be domiciled with Concordia Funding, and that Concordia Funding allows investors to participate at reduced risk as the notes are fully secured by the diversified pool of contracts purchased.²²⁶ The Memorandum stated that Concordia will experience growth at rates greater than the trucking industry in general because of Concordia's market share in port and railhead regions, and that growth in truck driver and trucking demand, along with new market penetration, will drive Concordia's growth over the next two years.²²⁷ The Memorandum stated that Concordia was able to make adjustments in light of the economic slide that are showing strong improvements for the current and future projections of portfolio performance.²²⁸ Mr. Crowder testified that Concordia had shown strong improvements in 2010 that allowed it to stabilize.²²⁹

Mr. Crowder testified that in 2010, copies of the Term Sheet and Memorandum were sent to Mr. Albers and Mr. Kirkman, as well as about eight to twelve other entities, some of whom were brokers/dealers.²³⁰ Mr. Crowder testified that, at the time, Concordia was between the First Amendment and the Second Amendment that were sent to investors.²³¹ Mr. Crowder testified that the

²²² Tr. at 1860; Exh. ER-15 at ACC011568.

²²³ Tr. at 1861-1862; Exh. ER-15 at ACC011566.

²²⁴ Tr. at 1865; Exh. ER-15 at ACC011559.

²²⁵ Tr. at 1865.

²²⁶ Tr. at 1866-1867; Exh. ER-15 at ACC011559.

²²⁷ Tr. at 1867; Exh. ER-15 at ACC011560.

²²⁸ Tr. at 1868; Exh. ER-15 at ACC011567.

²²⁹ Tr. at 1868.

²³⁰ Tr. at 1863-1865. As the Term Sheet in evidence is dated October 3, 2012, we interpret Mr. Crowder's testimony to mean that a substantially similar version was used in 2010.

²³¹ Tr. at 1869.

1 risks stated in the Memorandum did not include that Concordia was on the brink of bankruptcy.²³²

2 Mr. Crowder testified that discussions with Sunset Financial about Concordia Funding started
3 in 2010, after the First Amendment but before the Second Amendment.²³³ Mr. Crowder testified that
4 Concordia also attempted to offer debt collection services to other entities as a way to raise revenues
5 instead of entering into the Second Amendment.²³⁴ Mr. Crowder testified that Concordia Funding was
6 proposed to be a separate entity from Concordia with investors' money to stay with Concordia Funding
7 and the investors receiving shares and becoming members in the new entity.²³⁵ Mr. Crowder testified
8 that proposed new contracts would have been owned by Concordia Funding with Concordia acting as
9 the Custodian.²³⁶ Mr. Crowder testified that Concordia would have received origination and servicing
10 fees which, if Concordia Funding had been fully funded, would total \$800,000 per year.²³⁷ Mr.
11 Crowder testified that had Concordia received this \$800,000, the Second Amendment would not have
12 been needed.²³⁸ Mr. Crowder testified that discussions regarding Concordia Funding failed in 2011.²³⁹

13 Wesley L. Luhr

14 Mr. Luhr testified that he is a retired Deputy Sheriff for San Diego County who has been living
15 in Lake Havasu City, Arizona, since March 2003.²⁴⁰ Mr. Luhr testified that he became an investor in
16 Concordia while residing in Arizona.²⁴¹ Mr. Luhr was referred to Mr. Bersch for accounting services
17 and, at some point in the spring of 2004, Mr. Luhr and Mr. Bersch discussed the investment opportunity
18 with Concordia at Mr. Bersch's office in Lake Havasu.²⁴² Mr. Luhr testified that Mr. Bersch described
19 the Concordia investment as an opportunity to receive a high rate of return from an investment that was
20 secured by assets, namely the deeds to trucks.²⁴³ From speaking with Mr. Bersch, Mr. Luhr understood
21 Concordia to own trucks that were leased to contractors, with the revenue generated from these lease
22

23 ²³² Tr. at 1869.

24 ²³³ Tr. at 1887.

25 ²³⁴ Tr. at 1887.

26 ²³⁵ Tr. at 1887-1888, 1891.

27 ²³⁶ Tr. at 1888.

28 ²³⁷ Tr. at 1889.

²³⁸ Tr. at 1898.

²³⁹ Tr. at 1889.

²⁴⁰ Tr. at 201.

²⁴¹ Tr. at 201.

²⁴² Tr. at 202-203.

²⁴³ Tr. at 203.

1 agreements being applied to the investors.²⁴⁴

2 Mr. Luhr also knew Mr. Wanzek, who was his CPA and did his taxes through approximately
3 2012.²⁴⁵ Mr. Luhr could not recall if Mr. Bersch stated anything about his or Mr. Wanzek's relationship
4 with Concordia, but Mr. Luhr believed that Mr. Bersch was on the Board of Directors for Concordia.²⁴⁶
5 Mr. Luhr testified that Mr. Bersch described the benefits of an investment with Concordia: it provided
6 a ten percent return on principal, it was one hundred percent secured, and it was very liquid so Mr.
7 Luhr could quit at any time and his principal would be returned.²⁴⁷ Mr. Luhr could not recall Mr.
8 Bersch mentioning any potential risks about investing in Concordia other than that all investments are
9 risky, but an investment with Concordia was low risk because it was guaranteed by assets.²⁴⁸ Mr. Luhr
10 testified that he understands all investments have some risk and that the higher the interest rate, the
11 higher the risk.²⁴⁹ Mr. Luhr testified that he could not recall Mr. Bersch mentioning any role he would
12 have in the investment, but he later learned that Mr. Bersch's firm, ER Financial, processed the
13 contracts being divided out for the trucks, handled the financial arrangements from those contracts, and
14 made disbursements to the investors.²⁵⁰ Mr. Luhr testified that he received some written materials from
15 Mr. Bersch about the Concordia investment before he invested.²⁵¹

16 Mr. Luhr testified that he understood Concordia to hold the deeds to the trucks.²⁵² Mr. Luhr
17 testified that at the time he invested he did not know whether Mr. Bersch would receive any
18 compensation as a result of the investment, although he learned later that Mr. Bersch did.²⁵³ Mr. Luhr
19 testified that he would have wanted to know before he invested whether Mr. Bersch was to receive
20 compensation and that he was going to get a commission on the investment.²⁵⁴

21 Mr. Luhr invested \$100,000 on May 11, 2004, and started receiving interest payments the
22

23 ²⁴⁴ Tr. at 204.

24 ²⁴⁵ Tr. at 204, 234.

24 ²⁴⁶ Tr. at 204-205.

24 ²⁴⁷ Tr. at 205.

25 ²⁴⁸ Tr. at 208-209.

25 ²⁴⁹ Tr. at 236.

26 ²⁵⁰ Tr. at 205-206.

26 ²⁵¹ Tr. at 209-211; Exhs. 11e, 11f.

27 ²⁵² Tr. at 206. After reviewing the Servicing Agreement, Mr. Luhr testified that ER held the contracts along with the titles
of the trucks, but he was not sure whether he understood that at the time he invested. Tr. at 215-216.

28 ²⁵³ Tr. at 207.

²⁵⁴ Tr. at 207.

1 following month.²⁵⁵ Mr. Luhr testified that at the time of his investment, he believed Mr. Bersch knew
 2 Mr. Luhr's net worth, which was under \$1,000,000, excluding the value of his home.²⁵⁶ Mr. Luhr
 3 testified that his income in 2004 was under \$200,000.²⁵⁷ Mr. Luhr testified that he thought Concordia
 4 would be a good investment based upon: the information he received from Mr. Bersch that the
 5 investment was one hundred percent guaranteed, the impeccable reputation of Mr. Bersch, and the
 6 success of people who referred him to Mr. Bersch.²⁵⁸ Mr. Luhr also testified that Mr. Bersch told him
 7 that he was a certified financial planner, which was significant to Mr. Luhr's decision to invest.²⁵⁹ Mr.
 8 Luhr testified that before making his investment in Concordia, he did not have prior experience with
 9 businesses like Concordia and that he did not have much success in investing.²⁶⁰ Mr. Luhr had no prior
 10 experience with the trucking business, with financing commercial loans, or with collecting on
 11 commercial loans.²⁶¹ Mr. Luhr testified that he understood his role as an investor was simply to supply
 12 money, in increments of \$100,000, and for that he would receive a ten percent return.²⁶² Mr. Luhr
 13 testified that he understood that he could terminate the investment at any time and his principal would
 14 be returned without a problem.²⁶³ Mr. Luhr testified that his motivation for making the investment was
 15 to generate a stream of income.²⁶⁴

16 Mr. Luhr testified that before signing he "probably read parts" of the Servicing Agreement for
 17 his investment in Concordia, but Mr. Bersch talked to him about the terms of the agreement and Mr.
 18 Luhr found Mr. Bersch's explanation to be "very reassuring."²⁶⁵ Mr. Luhr testified that he and Mr.
 19 Bersch signed a Custodial Agreement in connection with his investment.²⁶⁶ Mr. Luhr testified that
 20 while the Servicing Agreement mentioned ER Financial and Advisory Service, he "wasn't totally clear"
 21 about who that entity was and what it did.²⁶⁷ Mr. Luhr testified that he understood defaults on trucker

22 ²⁵⁵ Tr. at 215, 250-251; Exh. S-12a.

23 ²⁵⁶ Tr. at 208.

24 ²⁵⁷ Tr. at 208.

25 ²⁵⁸ Tr. at 212.

26 ²⁵⁹ Tr. at 213.

27 ²⁶⁰ Tr. at 212.

28 ²⁶¹ Tr. at 213.

²⁶² Tr. at 213-214, 250.

²⁶³ Tr. at 263.

²⁶⁴ Tr. at 214.

²⁶⁵ Tr. at 214-215, 248-249; Exh. S-12a.

²⁶⁶ Tr. at 220-221; Exh. S-12b.

²⁶⁷ Tr. at 214; Exh. S-12a.

1 contracts would be provided for, but he was not sure if he specifically understood the terms of the
 2 Servicing Agreement as to the provision of substitute contracts.²⁶⁸ Mr. Luhr testified that he could not
 3 recall Mr. Bersch discussing the terms of the Servicing Agreement pertaining to a default by
 4 Concordia.²⁶⁹ Mr. Luhr testified that he did not recall ever giving written instructions to ER Financial,
 5 Mr. Bersch or Mr. Wanzek to send the contracts and truck titles back to Concordia, nor could he recall
 6 Concordia ever asking for his permission for the Custodian to release the contracts and truck titles back
 7 to Concordia.²⁷⁰

8 Mr. Luhr testified that, after investing, he received interest payments from Concordia from 2004
 9 through 2008, which arrived consistently but not necessarily at a regular time frame.²⁷¹ Mr. Luhr
 10 testified that he considered the interest payments to be income but he never received a Form 1099 for
 11 them and Mr. Bersch told him that many of the investors were not reporting the interest as income.²⁷²
 12 Mr. Luhr testified that he received a letter about Concordia being in financial trouble before receiving
 13 an amendment to the Servicing Agreement.²⁷³ Mr. Luhr testified that his understanding of the
 14 amendment was that, if he signed, Concordia would stop paying the ten percent interest and return a
 15 portion of his principal, otherwise he would lose his entire investment.²⁷⁴ Mr. Luhr testified that he did
 16 not recall having an opportunity to negotiate the terms of the amendment and that he felt like he had
 17 no choice but to sign it.²⁷⁵ Mr. Luhr admitted having the means to contact Concordia, and Mr. Luhr
 18 testified that he later received a Second Amendment to the Servicing Agreement stating that he would
 19 receive only \$45,000 of his original principal with \$55,000 being cancelled as bad debt.²⁷⁶ Mr. Luhr
 20 testified that he did not have an opportunity to negotiate the terms of the Second Amendment and he
 21 felt like he had no choice but to sign or risk losing \$16,000 of the \$71,000 principal that he was still
 22 owed.²⁷⁷ Mr. Luhr testified that he felt like he was "being dictated to" by Concordia with the

23
 24 ²⁶⁸ Tr. at 216-217; Exh. S-12a at § 4.1.

25 ²⁶⁹ Tr. at 217-218; Exh. S-12a at § 4.2.

26 ²⁷⁰ Tr. at 219-220.

27 ²⁷¹ Tr. at 206, 222, 238-239, 250.

28 ²⁷² Tr. at 222-223.

²⁷³ Tr. at 223-225; Exh. S-12c.

²⁷⁴ Tr. at 225-227.

²⁷⁵ Tr. at 226-227.

²⁷⁶ Tr. at 227-228, 237-238; Exhs. S-11d, S-12d.

²⁷⁷ Tr. at 229-230.

1 amendments and that the company was not acting in his best interest.²⁷⁸ On cross-examination, Mr.
 2 Luhr admitted that he had the ability to contact Concordia and he may have contacted the company
 3 about the amendments.²⁷⁹

4 Mr. Luhr testified that Concordia stopped sending him interest payments in 2009.²⁸⁰ Mr. Luhr
 5 testified that he continued to receive payments through August 2013.²⁸¹ When asked if he had received
 6 over \$93,000 from Concordia, per Concordia's figures, Mr. Luhr testified that amount was "fairly
 7 close" to what he believed he received including interest payments.²⁸² Mr. Luhr testified that he has
 8 claimed losses on his tax returns in some years as a result of his investment in Concordia.²⁸³ Mr. Luhr
 9 estimated that he received a tax benefit of approximately 11 percent from a \$3,000 claim.²⁸⁴ Mr. Luhr
 10 admitted that the economy was not in a good state at the end of 2008 and he had other investments that
 11 dropped in value, but not 55%.²⁸⁵

12 Suellen LeMay

13 Ms. LeMay testified that she is a retired respiratory therapist residing in Dewey, Arizona.²⁸⁶
 14 Ms. LeMay testified that she is an investor in Concordia and that she resided in Lake Havasu City,
 15 Arizona, at the time she made her investment.²⁸⁷ Ms. LeMay testified that she first learned about
 16 Concordia when Mr. Bersch, her CPA, presented her with information about the investment at his
 17 office in Lake Havasu City in 2002.²⁸⁸ Ms. LeMay testified that she was a landlord over seven units
 18 and Mr. Bersch did her taxes at the time.²⁸⁹ Ms. LeMay testified that Mr. Bersch gave her a flow chart
 19 describing the investment and he told her that he and Mr. Wanzek, both members of Concordia's Board
 20 of Directors, would be taking care of the investment.²⁹⁰ Ms. LeMay testified that she was attracted to
 21 Concordia's rate of return, 12% or \$1,000 per month, and ER Financial's holding of the truck contracts

22 ²⁷⁸ Tr. at 230-231.

23 ²⁷⁹ Tr. at 252-253.

²⁸⁰ Tr. at 234.

24 ²⁸¹ Tr. at 250.

²⁸² Tr. at 256-257.

25 ²⁸³ Tr. at 234.

²⁸⁴ Tr. at 235.

26 ²⁸⁵ Tr. at 252.

²⁸⁶ Tr. at 265.

27 ²⁸⁷ Tr. at 265-266.

²⁸⁸ Tr. at 266-267, 418-419.

28 ²⁸⁹ Tr. at 266-267.

²⁹⁰ Tr. at 267-268, 271; Exh. S-2e.

1 including the titles.²⁹¹ Ms. LeMay testified that she was told the truck contracts would be in her
 2 account, held in ER Financial's office, with the trucks serving as collateral for the investment.²⁹² Ms.
 3 LeMay testified that Mr. Bersch told her that non-performing truck contracts would be replaced with
 4 performing ones and Mr. Bersch and his family members had invested in Concordia.²⁹³ Ms. LeMay
 5 testified that she was more confident in the investment knowing that Mr. Bersch and Mr. Wanzek were
 6 on Concordia's Board of Directors and that they and their family members had invested in
 7 Concordia.²⁹⁴ Ms. LeMay testified that she inquired about the provision granting Concordia first
 8 refusal of investor sales at 95% and she was told that no one ever had been charged the five percent
 9 when asking for their money back.²⁹⁵ Mr. Bersch told her that if she ever needed money back from her
 10 investment to give him a call and that she should be able to receive it within a couple weeks.²⁹⁶

11 Ms. LeMay testified that Mr. Bersch pointed out that he would receive a custodial fee for
 12 holding the truck titles and contracts, but she did not know anything about him receiving a commission
 13 or a finder's fee.²⁹⁷ Ms. LeMay testified that Mr. Bersch told her that the truckers were paying high
 14 down payments and close to 30% interest but that they would be able to make their payments based on
 15 what they make in less than a week, which made Ms. LeMay believe that the loans had been set up in
 16 such a way so the truckers would not fail.²⁹⁸ Ms. LeMay testified that at the time of her investment,
 17 she understood the truckers to be working in the area of Long Beach, California.²⁹⁹ Ms. LeMay testified
 18 that she later learned from Mr. Wanzek that the trucks were being driven from Miami to Chicago.³⁰⁰

19 Ms. LeMay testified that Mr. Bersch knew her income at the time, which was between \$28,000
 20 and \$30,000.³⁰¹ Ms. LeMay testified that Mr. Bersch also knew her net worth, which was under
 21 \$1,000,000, excluding her personal residence, at the time.³⁰² Ms. LeMay testified that although the
 22

23 ²⁹¹ Tr. at 269.

24 ²⁹² Tr. at 269-270.

25 ²⁹³ Tr. at 270-271.

26 ²⁹⁴ Tr. at 276.

27 ²⁹⁵ Tr. at 271-272, 320, 419-420.

28 ²⁹⁶ Tr. at 272, 420.

²⁹⁷ Tr. at 272-273.

²⁹⁸ Tr. at 273-274.

²⁹⁹ Tr. at 275.

³⁰⁰ Tr. at 275-276.

³⁰¹ Tr. at 277.

³⁰² Tr. at 419.

1 minimum investment was supposed to be \$100,000, she was allowed to invest \$50,000, which she did
 2 on April 30, 2002.³⁰³ Ms. LeMay testified that she and Mr. Bersch signed a Custodial Agreement,
 3 naming ER Financial as Custodian, at the time of her investment.³⁰⁴ Ms. LeMay paid for her investment
 4 with a personal check that she gave to Mr. Bersch.³⁰⁵ Ms. LeMay testified that prior to her investment,
 5 she had no prior experience in the trucking business or collecting on commercial loans, although she
 6 had invested with a person who bought, rehabbed and flipped homes in Nevada.³⁰⁶ Ms. LeMay testified
 7 that she had no role in the investment other than putting up her money.³⁰⁷ Ms. LeMay testified that her
 8 motivation for making the investment was to increase her income outside of her retirement funds.³⁰⁸

9 Ms. LeMay testified that she was an Arizona resident at the time she made her investment.³⁰⁹
 10 Ms. LeMay testified that she had received a copy of the Servicing Agreement either from Mr. Bersch
 11 or in the mail.³¹⁰ Ms. LeMay testified that she understood substitute contracts to mean that if a trucker
 12 defaulted on a contract in her name, Concordia would replace the contract in her portfolio with
 13 another.³¹¹ Ms. LeMay testified that the holding of the truck contracts and vehicle titles in Lake Havasu
 14 City was significant to her decision to invest.³¹² Ms. LeMay testified that she neither gave permission,
 15 nor was she asked to give permission, for ER Financial and Mr. Bersch to send the Conditional Sales
 16 Contracts or titles back to Concordia.³¹³ Ms. LeMay testified that she was included in a letter sent by
 17 a family member requesting to see their contracts.³¹⁴ Ms. LeMay testified that they never saw the
 18 contracts, but they did receive a list of the contracts attached to monthly checks.³¹⁵ The Servicing
 19 Agreement referred to an attachment, Exhibit A, listing truck contracts.³¹⁶ Ms. LeMay testified that
 20 the Exhibit A for her Servicing Agreement was never filled out with truck contracts.³¹⁷ Ms. LeMay

21 ³⁰³ Tr. at 277-278, 280, 315, 395; Exh. S-2a.

22 ³⁰⁴ Tr. at 284-285; Exh. S-2b.

23 ³⁰⁵ Tr. at 285-286.

24 ³⁰⁶ Tr. at 278-279, 389.

25 ³⁰⁷ Tr. at 279.

26 ³⁰⁸ Tr. at 279.

27 ³⁰⁹ Tr. at 280.

28 ³¹⁰ Tr. at 281.

³¹¹ Tr. at 282.

³¹² Tr. at 282-283.

³¹³ Tr. at 283-284.

³¹⁴ Tr. at 284.

³¹⁵ Tr. at 284.

³¹⁶ Tr. at 421; Exh. S-2a at ACC000003.

³¹⁷ Tr. at 421.

1 testified that she asked why Exhibit A was not filled out and she was told that contracts would not be
 2 assigned until her money goes into Concordia, and the contracts come back to Mr. Bersch and ER
 3 Financial, who then assign the contracts and put them in a safe.³¹⁸ Ms. LeMay testified that she never
 4 saw a list of contracts that were maintained for her.³¹⁹

5 Ms. LeMay testified that she received a letter from Mr. Bersch and Mr. Wanzek and a
 6 subsequent letter from Concordia, dated August 10, 2006, both discussing investment opportunities
 7 with a new company that Concordia would be forming and stating that investors could continue to
 8 invest under the current structure by September 30, 2006.³²⁰ Ms. LeMay testified that she made an
 9 additional investment of \$10,000 in 2006 based on the letters.³²¹ Ms. LeMay testified that another
 10 \$10,000 was added to her account as a gift from her mother who made a payment to Concordia.³²² Ms.
 11 LeMay testified that she further built up her account by having some of her interest payments reinvested
 12 rather than having them paid to her.³²³ Ms. LeMay testified that these additional investments raised
 13 her principal balance over \$100,000.³²⁴ Ms. LeMay testified that she did not know how much money
 14 she had received in cash from Concordia.³²⁵

15 Ms. LeMay testified that she received a March 6, 2009 letter from Chris Crowder stating that
 16 Concordia had been hit hard by the current financial crisis.³²⁶ While the March 6, 2009 letter stated
 17 that Concordia had taken large losses over the last year and a half, Ms. LeMay testified that Mr. Bersch
 18 and Mr. Wanzek had not shared this information with her.³²⁷ Ms. LeMay testified that prior to
 19 receiving this letter, she did not know that Concordia was having financial trouble or that other
 20 investors had requested to withdraw their funds from the company.³²⁸ The March 6, 2009 letter further
 21 stated that Concordia's attorney was drafting a new agreement for Ms. LeMay to sign and that future
 22

23 ³¹⁸ Tr. at 421-422.

24 ³¹⁹ Tr. at 422.

25 ³²⁰ Tr. at 286-292, 369-370; Exhs. S-2f, S-2g.

26 ³²¹ Tr. at 286, 291-292, 315, 395.

27 ³²² Tr. at 315-316, 395.

28 ³²³ Tr. at 316.

³²⁴ Tr. at 316, 426-427.

³²⁵ Tr. at 396-397.

³²⁶ Tr. at 294; Exh. S-2i.

³²⁷ Tr. at 295; Exh. S-2i.

³²⁸ Tr. at 358, 360-361; Exh. S-2i.

1 checks sent to investors would be classified as return of capital rather than interest.³²⁹

2 Ms. LeMay testified that she received a second letter, dated March 10, 2009, from Concordia
3 asking that she sign an amendment to her existing contract.³³⁰ The March 10, 2009 letter was
4 accompanied by the First Amendment.³³¹ Ms. LeMay testified that she was not given a chance to
5 negotiate the terms of the proposed amendment.³³² Ms. LeMay testified that, after speaking with her
6 brothers, Paul Singleton and John Verne Singleton, she decided not to sign the amendment.³³³ Ms.
7 LeMay testified that she subsequently received a letter from Concordia stating that if they do not
8 receive her amendment by April 24, they would hold aside further return on principal.³³⁴ Ms. LeMay
9 testified that she did not think Concordia had the right to withhold her return of principal and she felt
10 like the company was “trying to twist my arm.”³³⁵ Ms. LeMay testified that she received another letter
11 from Concordia stating that the company had received over 80% of the investors’ signed amendments,
12 payments would only be made to investors who have signed and returned the amendment, and that all
13 current and future payments to her would be suspended pending receipt of her amendment.³³⁶ Ms.
14 LeMay testified that she felt coerced by the information in this letter.³³⁷

15 Ms. LeMay testified that her brother sent a letter, dated April 13, 2009, to Chris Crowder
16 requesting additional information regarding his and his siblings’ investments.³³⁸ Ms. LeMay testified
17 that her brother sent a second letter, dated April 24, 2009, to Chris Crowder again requesting
18 information regarding the family’s accounts and the overall health of Concordia.³³⁹

19 Ms. LeMay testified that she faxed a letter, dated June 10, 2012, to Chris Crowder, along with
20 a signed copy of her Second Amendment to Servicing Agreement, dated June 12, 2012.³⁴⁰ Under the
21 terms of the Second Amendment, 55% of Ms. LeMay’s investment was “cancelled as a bad debt,”
22

23 ³²⁹ Tr. at 297; Exh. S-2i.

24 ³³⁰ Tr. at 296; Exh. S-2j.

25 ³³¹ Tr. at 296; Exh. S-2c.

26 ³³² Tr. at 297.

27 ³³³ Tr. at 298-299.

28 ³³⁴ Tr. at 299; Exh. S-2k.

³³⁵ Tr. at 300.

³³⁶ Tr. at 300-301; Exh. S-2l.

³³⁷ Tr. at 302.

³³⁸ Tr. at 302-304; Exh. S-2m.

³³⁹ Tr. at 304-311; Exh. S-2n.

³⁴⁰ Tr. at 312-313; Exhs. S-2d, S-2q.

1 reducing the amount owed to her, as of February 1, 2009, from \$66,554.03 to \$11,159.06.³⁴¹ The
 2 Second Amendment also contained a provision whereby the investor released Concordia and “its
 3 officers, directors, agents and employees from any and all liability under the original Agreement”
 4 except as amended by the Second Amendment.³⁴² Ms. LeMay testified that she signed the Second
 5 Amendment after discovering that her mother and brothers’ accounts had been reduced for the checks
 6 that had been withheld.³⁴³ Ms. LeMay testified that Concordia’s loss of \$838,000 in 2006 was
 7 information that she would have wanted to know and, had she known, she would not have reinvested
 8 her interest payments.³⁴⁴ Ms. LeMay testified that she would have asked for her money back had she
 9 known Concordia was losing money.³⁴⁵

10 Ms. LeMay testified that she received a letter from Concordia, dated June 13, 2012, in response
 11 to her questions.³⁴⁶ Ms. LeMay testified that the June 13, 2012 letter did not entirely satisfy the
 12 questions she had posed because she considered the explanation she received to be “in very general
 13 terms” and she did not receive an accounting of her money over the years.³⁴⁷

14 Ms. LeMay testified that she received a copy of an August 19, 2009 letter, and accompanying
 15 financial information about Concordia, from the law firm of Millar, Hodges & Bemis that was sent to
 16 her brother, Paul Singleton.³⁴⁸ Ms. LeMay testified that based on the custodial fees reported in
 17 Concordia’s financial information, she determined that ER Financial held approximately \$2.5 million
 18 in truck contracts at the end of fiscal year 2008, but that number dropped significantly in 2009, which
 19 caused Ms. LeMay concern that other investors no longer had contracts while she still had hers.³⁴⁹

20 Ms. LeMay testified that she received a copy of a November 4, 2009 letter sent by her brother,
 21 Paul Singleton, to attorney Richard Millar, Jr., of Millar, Hodges & Bemis, requesting that Concordia
 22 release the checks being held for him and his family members.³⁵⁰ Ms. LeMay testified that she also
 23

24 ³⁴¹ Tr. at 314, 371-372; Exh. S-2d.

25 ³⁴² Tr. at 372; Exhs. S-2d, S-3c.

26 ³⁴³ Tr. at 316-317.

27 ³⁴⁴ Tr. at 320.

28 ³⁴⁵ Tr. at 320-321.

³⁴⁶ Tr. at 321; Exh. S-2r.

³⁴⁷ Tr. at 321-323.

³⁴⁸ Tr. at 325; Exh. S-4h.

³⁴⁹ Tr. at 325-328; Exh. S-4h.

³⁵⁰ Tr. at 329-330; Exh. S-8g.

1 received a copy of Paul Singleton's January 14, 2010 letter³⁵¹ to Mr. Millar requesting Concordia's
 2 2009 financial statement and a "reasonable, transparent and detailed explanation" as to why Concordia
 3 was demanding that they sign a new contract.³⁵² Ms. LeMay testified that she received a copy of Paul
 4 Singleton's September 18, 2010 letter to Mr. Millar again requesting Concordia's 2009 financial
 5 data.³⁵³ Ms. LeMay testified that she received a copy of Paul Singleton's November 4, 2010 letter to
 6 Mr. Millar again requesting Concordia's 2009 financial data, requesting a copy of the contracts held
 7 by Mr. Singleton, and requesting a meeting with Mr. Millar and Mr. Crowder on December 1, 2010.³⁵⁴
 8 In a November 20, 2010 letter to Mr. Crowder, Paul Singleton requested Concordia's balance sheet
 9 and income statement for 2009 and the same data for the current year to that date, and also suggested
 10 times for an in-person meeting in early December.³⁵⁵ A December 14, 2010 letter from Paul Singleton
 11 to Chris Crowder acknowledged their meeting on December 2, 2010, and Concordia's offer to buy out
 12 the family's contracts at 20% of the balance of the investments.³⁵⁶ The December 14, 2010 letter again
 13 requested audited financial reports from mid-2009 to the present.³⁵⁷ A December 17, 2010 letter from
 14 Paul Singleton to Chris Crowder offered a \$50 money order for Concordia to give to an employee in
 15 exchange for copying or scanning financial reports after normal work hours to provide a copy to Mr.
 16 Singleton.³⁵⁸ On or about December 22, 2010, Mr. Singleton received a reply letter from Mr. Crowder
 17 stating that Concordia was not required to, and would not, provide any additional financial information,
 18 that no buy-out offer had been extended, and that the company was returning the \$50 money order.³⁵⁹
 19 A March 8, 2011 letter from Paul Singleton to Chris Crowder once more requested recent financial
 20 statements from Concordia.³⁶⁰ An April 18, 2011 letter from Paul Singleton to Chris Crowder
 21 expressed disappointment that Mr. Crowder had not responded to the March 8, 2011 letter or provided
 22

23 ³⁵¹ The letter is dated with a typographical error, reading "January 14 1010." Exh. S-8h. As the letter requests financial
 24 data for the year 2009, and in the context of other correspondence which is part of the record, we conclude the date of the
 letter to be January 14, 2010.

25 ³⁵² Tr. at 330-332; Exh. S-8h.

26 ³⁵³ Tr. at 334; Exh. S-8i.

27 ³⁵⁴ Tr. at 336-337; Exh. S-8j.

28 ³⁵⁵ Tr. at 338-339; Exh. S-8k.

³⁵⁶ Tr. at 339, 341; Exh. S-8l.

³⁵⁷ Exh. S-8l.

³⁵⁸ Tr. at 345; Exh. S-8m.

³⁵⁹ Tr. at 346-348; Exh. S-8n.

³⁶⁰ Tr. at 350-351; Exh. S-8o.

1 the requested financial information.³⁶¹

2 Ms. LeMay testified that she met with Mr. Bersch before the Second Amendment was sent to
3 investors and asked whether he had signed the First Amendment.³⁶² Ms. LeMay testified that Mr.
4 Bersch told her that he had signed the First Amendment because it would be “better to get something
5 back than nothing.”³⁶³ Ms. LeMay testified that she asked him how things had gotten to this point and
6 Mr. Bersch told her that he didn’t know anything more than she did and he was “just an investor.”³⁶⁴
7 Ms. LeMay testified that she stated to Mr. Bersch that he was on Concordia’s Board of Directors and
8 she asked why he didn’t tell her that the contracts were not performing, to which Mr. Bersch told her
9 that he had not been on Concordia’s Board of Directors for years.³⁶⁵

10 Ms. LeMay testified that she felt ER Financial had “bailed” on the investors for whom it had a
11 duty “to keep an eye” on their investments.³⁶⁶ Ms. LeMay testified that she did not believe Mr. Bersch’s
12 family had been “hit up for the millions of dollars that they said they had invested” in the way her
13 family’s investments had been affected.³⁶⁷ Ms. LeMay testified that she felt discouraged by the way
14 Concordia responded to correspondence from her family.³⁶⁸

15 On cross-examination, Ms. LeMay acknowledged that she understood any investment had risk
16 and a higher interest rate would carry higher risk.³⁶⁹ Ms. LeMay acknowledged that the Servicing
17 Agreement stated that the truck contracts would be considered lower grade under industry standards.³⁷⁰
18 Ms. LeMay testified that she placed an advertisement in the classified section of a general circulation
19 newspaper in Lake Havasu City that asked “Concerned About Concordia Financial investment?” with
20 her email address.³⁷¹ Ms. LeMay testified that she wanted to hear from other Concordia investors, but
21 those communications “didn’t go anywhere.”³⁷²

22
23 ³⁶¹ Tr. at 362-363; Exh. S-8p.

24 ³⁶² Tr. at 354-355.

25 ³⁶³ Tr. at 356.

26 ³⁶⁴ Tr. at 356.

27 ³⁶⁵ Tr. at 356-358.

28 ³⁶⁶ Tr. at 367.

³⁶⁷ Tr. at 368.

³⁶⁸ Tr. at 366.

³⁶⁹ Tr. at 371.

³⁷⁰ Tr. at 370-371; Exh. S-2a at § 8.

³⁷¹ Tr. at 373; Exh. ER-4.

³⁷² Tr. at 424-425.

1 Ms. LeMay testified that Mr. Bersch did her taxes for several years and then Mr. Wanzek did
 2 them through approximately 2012.³⁷³ Ms. LeMay testified that she claimed losses from Concordia on
 3 some of her tax returns.³⁷⁴

4 Ms. LeMay testified that her brother, Paul Singleton, is a professor emeritus from the University
 5 of Hawaii, and her other brother, Verne Singleton, is a recently retired hospital administrator.³⁷⁵ From
 6 her initial investment in 2002 through 2008, Ms. LeMay received interest payments in the form of
 7 checks or re-investments.³⁷⁶ At the time she made her initial investment, Ms. LeMay had 25 years of
 8 experience managing personal investments and retirement account investments for herself, her
 9 husband, and her children.³⁷⁷ Ms. LeMay's investment experience involved trading stocks and mutual
 10 funds and she testified to once having purchased a REIT in 1983, which she decided was not for her.³⁷⁸
 11 Ms. LeMay testified that she also had invested in seven apartments in Lake Havasu before 2002, for
 12 which she "ran the numbers" to determine whether they would be a good investment.³⁷⁹ Ms. LeMay's
 13 real estate investments in Nevada involved purchasing houses, for which she received interest until the
 14 house was sold and her money was returned or reinvested in another house.³⁸⁰ Ms. LeMay described
 15 her brothers as sophisticated investors.³⁸¹

16 Philip Hatch

17 Mr. Hatch testified that he is a retired fire fighter captain who has lived in Lake Havasu City,
 18 Arizona since 1998.³⁸² Mr. Hatch testified that he first became aware of Concordia in 2005 from Mr.
 19 Wanzek, who did Mr. Hatch's taxes at the time and suggested Concordia as an investment opportunity
 20 after Mr. Hatch had money from selling a four-unit apartment building.³⁸³ Mr. Hatch testified that he
 21 never met Mr. Bersch and that he does not know who he is.³⁸⁴ Mr. Hatch testified that Mr. Wanzek
 22

23 ³⁷³ Tr. at 374.

24 ³⁷⁴ Tr. at 376.

25 ³⁷⁵ Tr. at 379-380.

26 ³⁷⁶ Tr. at 381-382.

27 ³⁷⁷ Tr. at 382-384.

28 ³⁷⁸ Tr. at 385-386.

³⁷⁹ Tr. at 386-388.

³⁸⁰ Tr. at 389-390.

³⁸¹ Tr. at 393.

³⁸² Tr. at 444, 473-475.

³⁸³ Tr. at 445-446, 469. Mr. Hatch testified that, as of the hearing date, Mr. Wanzek still did his taxes. Tr. at 450, 470.

³⁸⁴ Tr. at 461-462.

1 showed him some documents and flow charts about the investment.³⁸⁵ Mr. Hatch testified that he
 2 understood Concordia bought truck contracts from the sellers of the trucks and Concordia made money
 3 on the interest from the contracts.³⁸⁶ Mr. Hatch testified that he understood ER Financial brought in
 4 investors and made money by maintaining the truck contracts.³⁸⁷ Mr. Hatch testified that Mr. Wanzek
 5 said his mother had invested over \$1,000,000 in Concordia.³⁸⁸ Mr. Hatch testified that he trusted Mr.
 6 Wanzek because Mr. Wanzek was his accountant.³⁸⁹ Mr. Hatch testified that he was not very
 7 knowledgeable about investments and he discussed the Concordia investment with a more
 8 knowledgeable friend who knew other people who had invested in Concordia.³⁹⁰ Mr. Hatch testified
 9 that he was attracted to the Concordia investment because: it paid higher interest than he could get from
 10 a bank; the principal was secured by the truck contracts; Mr. Wanzek, through ER Financial, possessed
 11 the contracts; and he would be able to get his principal back because it was “basically liquid” and the
 12 investment was “pretty safe.”³⁹¹ Mr. Hatch testified that he understood ER Financial would hold the
 13 truck contracts until the loans were paid off.³⁹² Mr. Hatch testified that he did not know whether Mr.
 14 Wanzek stated that he would receive a fee for holding the contracts, but Mr. Hatch expected he
 15 would.³⁹³ Mr. Hatch testified that the only discussion about risks from the investment he recalled was
 16 that Mr. Wanzek said they had collateral in the trucks.³⁹⁴

17 Mr. Hatch testified that at the time of his investment, his net worth, excluding his primary
 18 residence, was under \$1,000,000.³⁹⁵ Mr. Hatch testified that Mr. Wanzek probably knew his net worth
 19 because Mr. Wanzek did his taxes.³⁹⁶ Mr. Hatch testified that he thought his income was under
 20

21 ³⁸⁵ Tr. at 446.

22 ³⁸⁶ Tr. at 446.

23 ³⁸⁷ Tr. at 446-447.

24 ³⁸⁸ Tr. at 447.

25 ³⁸⁹ Tr. at 447-448.

26 ³⁹⁰ Tr. at 448, 469, 490-491.

27 ³⁹¹ Tr. at 448-449.

28 ³⁹² Tr. at 449-450.

³⁹³ Tr. at 451.

³⁹⁴ Tr. at 451.

³⁹⁵ Tr. at 452. On cross-examination, Mr. Hatch testified that he sold his four-unit apartment complex for “probably around a million dollars.” Tr. at 478. On further questioning as to his net worth and the sale of the apartment complex, Mr. Hatch testified that he could be “a little foggy” in his recollections but he did not believe his net worth, not including his house, was in excess of \$1,000,000. Tr. at 488-490.

³⁹⁶ Tr. at 452.

1 \$200,000 the year he invested.³⁹⁷ Mr. Hatch testified that his motivation for making the investment
2 was to protect his money and generate an income stream for his retirement.³⁹⁸

3 Mr. Hatch testified that he signed a Servicing Agreement reflecting a \$150,000 purchase
4 price.³⁹⁹ Mr. Hatch testified that he read the Servicing Agreement before he signed, but that it was
5 hard for him to understand the document.⁴⁰⁰ Mr. Hatch testified that he believed he received the
6 Servicing Agreement from Mr. Wanzek as he did not have contact with anyone else regarding the
7 investment.⁴⁰¹ Mr. Hatch testified that he did not recall ever giving permission for ER Financial to
8 send truck contracts and titles back to Concordia, or that he was ever asked by Mr. Wanzek or ER
9 Financial for permission to do so.⁴⁰² The Servicing Agreement and Custodial Agreement for Mr.
10 Hatch's investment both had an effective date of December 1, 2005.⁴⁰³

11 Mr. Hatch testified that, after making his investment, he received interest payments from
12 September 2005 through February 2009, at which time he received payments in the form of account
13 withdrawals.⁴⁰⁴ Mr. Hatch testified that he received interest of approximately \$1,260 per month and
14 \$15,000 per year, totaling \$51,885.42 from September 13, 2005, through February 15, 2009.⁴⁰⁵ Mr.
15 Hatch testified that he received further payments, from March 2009 through November 2013, in a total
16 amount of \$68,750.⁴⁰⁶ Mr. Hatch testified that he received an amendment to the Servicing Agreement
17 in the mail from Concordia.⁴⁰⁷ Mr. Hatch testified that he had been receiving quarterly progress reports
18 from Concordia that sounded "worse and worse" as to how the business was doing.⁴⁰⁸ Mr. Hatch
19 testified that he was under the impression that if he did not sign the amendment then he might not
20 receive any more monthly payments, so he believed that a monthly account withdrawal would be better
21 than receiving nothing.⁴⁰⁹ Mr. Hatch testified that he believed he got the impression that he would stop

22 ³⁹⁷ Tr. at 452.

23 ³⁹⁸ Tr. at 453.

24 ³⁹⁹ Tr. at 455; Exh. S-108a.

25 ⁴⁰⁰ Tr. at 455.

26 ⁴⁰¹ Tr. at 455-456.

27 ⁴⁰² Tr. at 456-457.

28 ⁴⁰³ Tr. at 458; Exh. S-108a, S-108b.

⁴⁰⁴ Tr. at 458, 480.

⁴⁰⁵ Tr. at 480-482.

⁴⁰⁶ Tr. at 483.

⁴⁰⁷ Tr. at 459.

⁴⁰⁸ Tr. at 459, 485-486.

⁴⁰⁹ Tr. at 459-460, 462.

1 receiving monthly payments based upon communications he received from Concordia.⁴¹⁰ Mr. Hatch
 2 testified that Concordia never reached out for his input on a proposed amendment and he was not given
 3 an opportunity to negotiate the terms of the amendment.⁴¹¹ Mr. Hatch testified that Mr. Wanzek never
 4 contacted him about the proposed amendment.⁴¹² Mr. Hatch testified that Concordia did not offer him
 5 anything in exchange for signing the amendment.⁴¹³ Mr. Hatch testified that he felt he needed to sign
 6 the amendment otherwise he would have to hire an attorney.⁴¹⁴

7 Mr. Hatch testified that he received a Second Amendment to Servicing Agreement in the mail
 8 from Concordia.⁴¹⁵ Mr. Hatch testified that he didn't think Concordia reached out to him for input on
 9 a proposed Second Amendment.⁴¹⁶ Under the terms of the Second Amendment, 55% of the investment
 10 balance was cancelled as bad debt and the investment amount under the Servicing Agreement was
 11 reduced from \$107,599.32 to \$25,099.32.⁴¹⁷ Mr. Hatch testified that he signed the Second Amendment
 12 so that he could continue to receive checks and recover as much of his investment as possible.⁴¹⁸ Mr.
 13 Hatch testified that he did not talk with anyone at Concordia prior to signing the Second Amendment,
 14 and that he did not think that he spoke with Mr. Wanzek about it either.⁴¹⁹ Mr. Hatch testified that he
 15 received \$26,349.32 after signing the Second Amendment.⁴²⁰

16 On cross-examination, Mr. Hatch testified that the value of his apartment building would have
 17 gone down if he had not sold when he did.⁴²¹ Mr. Hatch testified that he would agree with Mr. Wanzek
 18 if Mr. Wanzek testified that Concordia losses had been claimed on some of his tax returns.⁴²² Mr.
 19 Hatch testified that he understood that any investment has some risk and that the higher the interest
 20 rate, the higher the risk.⁴²³ Mr. Hatch testified that in 2002 he controlled no investments other than the
 21

22 ⁴¹⁰ Tr. at 460.

23 ⁴¹¹ Tr. at 461, 463.

24 ⁴¹² Tr. at 461.

25 ⁴¹³ Tr. at 463.

26 ⁴¹⁴ Tr. at 463.

27 ⁴¹⁵ Tr. at 463.

28 ⁴¹⁶ Tr. at 464.

⁴¹⁷ Tr. at 464; Exh. S-108d.

⁴¹⁸ Tr. at 464-465, 468, 486.

⁴¹⁹ Tr. at 465.

⁴²⁰ Tr. at 493.

⁴²¹ Tr. at 470.

⁴²² Tr. at 470-471.

⁴²³ Tr. at 471-472.

1 four-unit apartment building.⁴²⁴

2 Stephen P. Dennison

3 Mr. Dennison testified that he is a resident of Tucson, Arizona, who worked as a vice president
4 in charge of sales for a mechanical sales company prior to retiring in 1994.⁴²⁵ Mr. Dennison testified
5 that he invested in Concordia while residing in Lake Havasu City, Arizona.⁴²⁶ Mr. Dennison first
6 learned about the Concordia investment at the office of his accountant, Mr. Bersch, while Mr. Bersch
7 was working on his taxes.⁴²⁷ Mr. Dennison testified that the investment was described by Mr. Bersch
8 as an opportunity to earn 12% on his investment from interest attained through the sale of trucks.⁴²⁸
9 Mr. Dennison testified that Mr. Bersch did not state that he was part of Concordia.⁴²⁹ Mr. Dennison
10 testified that he understood from Mr. Bersch that the principal of his investment could be returned
11 within a week or two if he asked for it back.⁴³⁰ Mr. Dennison testified that Mr. Bersch explained that
12 Mr. Bersch's role would be Custodian for the contracts, which would be kept in his office, although
13 Mr. Bersch did not disclose whether he would make any money if Mr. Dennison invested.⁴³¹ Mr.
14 Dennison testified that Mr. Bersch did not describe any risks involved with the investment.⁴³²

15 Mr. Dennison testified that at the time of his investment in 2000, his net worth, exclusive of his
16 home, was less than \$1M and that his annual income was less than \$200,000.⁴³³ Mr. Dennison testified
17 that Mr. Bersch did not ask about his net worth or his ability to withstand the loss of some or all of his
18 investment.⁴³⁴ Mr. Dennison testified that prior to investing, he had no experience with the trucking
19 business or financing commercial loans.⁴³⁵ Mr. Dennison testified that he thought it was a good
20 investment because he believed his accountant, Mr. Bersch, and because Mr. Dennison had a friend
21 who was successfully involved in a similar business with automobiles.⁴³⁶ Mr. Dennison testified that

22 ⁴²⁴ Tr. at 480.

23 ⁴²⁵ Tr. at 496, 525.

24 ⁴²⁶ Tr. at 496.

25 ⁴²⁷ Tr. at 497.

26 ⁴²⁸ Tr. at 497-499.

27 ⁴²⁹ Tr. at 497-498.

28 ⁴³⁰ Tr. at 498.

⁴³¹ Tr. at 498-500.

⁴³² Tr. at 499.

⁴³³ Tr. at 500.

⁴³⁴ Tr. at 500.

⁴³⁵ Tr. at 501.

⁴³⁶ Tr. at 500-501, 529.

1 he understood from Mr. Berch that he would not need to do anything in connection with Concordia's
 2 servicing or collection on the truck loans.⁴³⁷ Mr. Dennison testified he was motivated to make the
 3 investment to obtain a stream of retirement income for himself.⁴³⁸

4 Mr. Dennison testified that he signed a Servicing Agreement reflecting his investment of
 5 \$50,000 on March 30, 2000.⁴³⁹ Mr. Dennison testified that the Servicing Agreement identified the
 6 truck contracts as being considered lower quality and that he understands that all investments have
 7 some risk with the higher the interest rate, the higher the risk.⁴⁴⁰ Mr. Dennison testified that he never
 8 gave written instructions to ER Financial, Mr. Bersch, or Concordia to dispose of the truck contracts
 9 and title assignments held by the Custodian, nor did Mr. Bersch or Concordia ask for such
 10 permission.⁴⁴¹ Mr. Dennison testified that he signed a Custodial Agreement, dated March 30, 2000,
 11 that was also signed by Mr. Bersch.⁴⁴² Mr. Dennison testified that he made a second investment of
 12 \$50,000, as reflected by a Servicing Agreement effective January 4, 2001, on behalf of his children as
 13 college funds for his grandchildren.⁴⁴³ Mr. Dennison testified that he signed a Custodial Agreement
 14 for this second investment, dated January 4, 2001, that was also signed by Mr. Bersch.⁴⁴⁴ Mr. Dennison
 15 testified that he invested \$50,000 for himself, \$50,000 for his two children, \$50,000 for two nieces,
 16 another \$25,000 for himself, and another \$20,000 for the children and nieces, for a total investment of
 17 \$195,000.⁴⁴⁵ Mr. Dennison testified that he did not know how much money he received in payments
 18 from Concordia.⁴⁴⁶

19 Mr. Dennison testified that he received a letter to "our Portfolio Investors," unsigned but
 20 credited to Mr. Bersch and Mr. Wanzek, discussing Concordia's growth.⁴⁴⁷ Mr. Dennison testified that
 21 the letter stated that "[a]s in the past, we also will monitor the financial position of Concordia," which
 22 is what Mr. Dennison understood Mr. Bersch to be doing with respect to his investment, and the letter

23 ⁴³⁷ Tr. at 501.

24 ⁴³⁸ Tr. at 501-502.

⁴³⁹ Tr. at 504-505, 521-522, 529; Exh. S-17a.

25 ⁴⁴⁰ Tr. at 521; Exh. S-17a.

⁴⁴¹ Tr. at 505-506.

26 ⁴⁴² Tr. at 506-507; Exh. S-17b.

⁴⁴³ Tr. at 508-509; Exh. S-143a.

27 ⁴⁴⁴ Tr. at 509; Exh. S-143b.

⁴⁴⁵ Tr. at 529-530, 532.

28 ⁴⁴⁶ Tr. at 519, 532-534.

⁴⁴⁷ Tr. at 510; Exh. S-17e.

1 described Concordia's financial condition at the time as "excellent."⁴⁴⁸

2 Mr. Dennison testified that he received monthly interest payments from Concordia beginning
3 in 2000 through 2009.⁴⁴⁹ Mr. Dennison testified that he received an Amendment to Servicing
4 Agreement in the mail from Concordia.⁴⁵⁰ Mr. Dennison testified that prior to receiving the First
5 Amendment, he was not contacted by Mr. Bersch or Concordia about input regarding a possible
6 amendment.⁴⁵¹ Mr. Dennison testified that prior to receiving the First Amendment and possibly a letter,
7 in March 2009, neither Mr. Bersch nor Concordia informed Mr. Dennison that Concordia was in
8 financial trouble.⁴⁵² Mr. Dennison testified that he had some idea that Concordia was having financial
9 trouble in late 2008 when he called multiple times after his checks were not arriving timely, only to
10 receive "different answers every time."⁴⁵³ Mr. Dennison testified that he never had an opportunity to
11 negotiate the First Amendment.⁴⁵⁴ Mr. Dennison testified that about the time he received the
12 amendment, he talked with somebody at Concordia about withdrawing all of his money and he was
13 told that Concordia did not have the money available at the time, although they would in the future.⁴⁵⁵
14 Mr. Dennison testified that he did not talk with Mr. Bersch about whether to sign the amendment
15 because Mr. Bersch "wasn't in the picture anymore," rather he was dealing with Mr. Wanzek, who, at
16 the time Concordia was defaulting on its payments, had explained how great the company would be
17 doing and stated he invested \$1M of his mother's money into it.⁴⁵⁶ Mr. Dennison testified that he, his
18 children, and his nieces signed the amendments because they were told that if they did not sign they
19 would not receive any more money from Concordia.⁴⁵⁷

20 Mr. Dennison testified that he received a Second Amendment to Servicing Agreement in the
21 mail from Concordia.⁴⁵⁸ Mr. Dennison testified that he did not recall being asked by Concordia for
22 input on the making of the Second Amendment and that he was not given an opportunity to negotiate

23 ⁴⁴⁸ Tr. at 510; Exh. S-17e.

24 ⁴⁴⁹ Tr. at 511-512, 522-523. Mr. Dennison testified that he paid taxes on his interest payments. Tr. at 519.

25 ⁴⁵⁰ Tr. at 512; Exh. S-17c.

26 ⁴⁵¹ Tr. at 512-513.

27 ⁴⁵² Tr. at 512.

28 ⁴⁵³ Tr. at 513.

⁴⁵⁴ Tr. at 514.

⁴⁵⁵ Tr. at 514-515.

⁴⁵⁶ Tr. at 515-516.

⁴⁵⁷ Tr. at 516-517, 534-535; Exhs. S-17c, S-143c.

⁴⁵⁸ Tr. at 517; Exh. S-17d.

1 its terms.⁴⁵⁹ Mr. Dennison testified that he talked with Mr. Wanzek about the Second Amendment,
 2 who told Mr. Dennison that he would not receive any money if he did not sign it.⁴⁶⁰ Mr. Dennison
 3 testified that he felt like he had no choice but to sign otherwise he would lose his money.⁴⁶¹ Mr.
 4 Wanzek testified that when he was presented with the amendments he told Mr. Wanzek that he wanted
 5 to take possession of the truck to get his money back.⁴⁶² Mr. Dennison testified that Mr. Wanzek told
 6 him there was "an awful lot of paperwork involved" and that Mr. Wanzek would look into it, but he
 7 never did.⁴⁶³

8 Mr. Dennison testified that beginning in 2009 through 2013, he received checks from Concordia
 9 for principal payments.⁴⁶⁴ Mr. Dennison testified that he did not claim any losses from Concordia on
 10 his tax returns.⁴⁶⁵

11 Mr. Dennison testified that while he was employed he had cash savings and investments in
 12 stocks and mutual funds, which he invested through a broker who was authorized to make trades on
 13 Mr. Dennison's behalf.⁴⁶⁶

14 Theresa Patricola

15 Ms. Patricola testified that she is semi-retired, presently doing some consulting work in human
 16 resources after having retired from prior positions as vice president of a high tech electronics company
 17 and executive director of Hospice of Havasu.⁴⁶⁷ Ms. Patricola holds a Bachelor of Science degree in
 18 business administration, a Master of Science degree in management/human resources, and her
 19 undergraduate or graduate coursework has included courses in accounting, financial analysis and
 20 economics.⁴⁶⁸ Ms. Patricola testified that she is married and resides in Scottsdale, Arizona.⁴⁶⁹ Ms.
 21 Patricola testified that her husband was a program manager for IBM and AT&T.⁴⁷⁰ Ms. Patricola
 22

23 ⁴⁵⁹ Tr. at 517.

24 ⁴⁶⁰ Tr. at 518.

25 ⁴⁶¹ Tr. at 518.

26 ⁴⁶² Tr. at 519-520.

27 ⁴⁶³ Tr. at 520.

28 ⁴⁶⁴ Tr. at 523.

⁴⁶⁵ Tr. at 523.

⁴⁶⁶ Tr. at 527-528.

⁴⁶⁷ Tr. at 703.

⁴⁶⁸ Tr. at 726-727.

⁴⁶⁹ Tr. at 703.

⁴⁷⁰ Tr. at 746.

1 testified that she lived in Lake Havasu City, Arizona, at the time she became an investor.⁴⁷¹

2 Ms. Patricola testified that she first became aware of Concordia in 2008 when Mr. Bersch
3 approached her with the investment, which he described as easy money, secure, with no risk
4 involved.⁴⁷² Ms. Patricola testified that she was familiar with the Concordia investment for a year or
5 two before because Hospice of Havasu was getting regular investment returns from it and because Mr.
6 Bersch and Ms. Fuhrman had mentioned it at parties.⁴⁷³ Ms. Patricola testified that she met with Mr.
7 Bersch at the office of Lisa Fuhrman, in Lake Havasu City, to discuss the investment opportunity.⁴⁷⁴
8 Ms. Patricola testified that she knew Ms. Fuhrman who was on the Board of Directors for Hospice of
9 Havasu.⁴⁷⁵ Ms. Patricola testified that Mr. Bersch described Concordia's business as holding contracts
10 for truckers, from whose payments Concordia would provide investors ten percent interest on their
11 investment.⁴⁷⁶ Ms. Patricola testified that she understood the truck loans were being given to people
12 with poor credit but it would not be a risk for investors because at any time the investors could receive
13 a return of their full investment, and if a trucker defaulted on a contract, Concordia would replace the
14 contract.⁴⁷⁷ Ms. Patricola testified that Mr. Bersch said there was no question about the safety of the
15 investment and that it was guaranteed by an insurance company.⁴⁷⁸ Ms. Patricola testified that Mr.
16 Bersch said his role in the investment would be to hold the contracts in collateral at his office.⁴⁷⁹ Ms.
17 Patricola testified that it gave her a sense of security knowing that the contracts would be held locally.⁴⁸⁰
18 Ms. Patricola testified that Mr. Bersch did not mention whether he or ER Financial would receive a fee
19 for holding the titles or receive a commission on the investment.⁴⁸¹ Ms. Patricola testified that Mr.
20 Bersch gave her a flow chart describing the investment, which she found appealing because it: offered
21 a substantial return for investors; involved a local firm, ER Financial; involved Kansas City Life,
22

23 ⁴⁷¹ Tr. at 705.

24 ⁴⁷² Tr. at 705-706.

25 ⁴⁷³ Tr. at 762.

26 ⁴⁷⁴ Tr. at 706, 738, 761-762.

27 ⁴⁷⁵ Tr. at 762.

28 ⁴⁷⁶ Tr. at 706-707, 709.

⁴⁷⁷ Tr. at 707, 763-764.

⁴⁷⁸ Tr. at 707, 763.

⁴⁷⁹ Tr. at 707-708.

⁴⁸⁰ Tr. at 708.

⁴⁸¹ Tr. at 708-709.

1 meaning that the investment had a good rating and was secured in case of loss.⁴⁸² Ms. Patricola testified
 2 that she had no experience in the trucking business or the commercial loan business before investing
 3 in Concordia.⁴⁸³ Ms. Patricola testified that she needed to do nothing in connection with the investment
 4 other than receive the checks.⁴⁸⁴ Ms. Patricola testified that she planned to use the monthly interest
 5 checks to cover her son's college tuition.⁴⁸⁵ Ms. Patricola received monthly monies from Concordia
 6 through approximately August 2013.⁴⁸⁶ Ms. Patricola testified that she received approximately
 7 \$10,000 of monthly payments that were designated as interest and approximately \$38,000 of monthly
 8 payments designated as principal.⁴⁸⁷

9 Ms. Patricola testified that she and her husband signed a Servicing Agreement reflecting an
 10 initial investment of \$100,000 made in April 2008.⁴⁸⁸ Ms. Patricola testified that she never gave written
 11 permission to ER Financial or Mr. Bersch to release the contracts and vehicle titles and that neither Mr.
 12 Bersch nor Concordia ever asked her permission for such a release.⁴⁸⁹ Ms. Patricola testified that she
 13 and her husband signed a Custodial Agreement with Concordia and ER Financial in connection with
 14 her investment.⁴⁹⁰ Ms. Patricola testified that she made a second investment of \$50,000 in November
 15 2008, because she was encouraged by Mr. Bersch to secure additional monthly interest.⁴⁹¹ Ms.
 16 Patricola testified that she stopped receiving interest payments two or three months later.⁴⁹² Ms.
 17 Patricola testified that Mr. Bersch never said anything negative about Concordia's financial position
 18 before she invested.⁴⁹³ Ms. Patricola testified that she would have wanted to know prior to investing
 19 that Concordia had a net loss of \$838,556 for the twelve months ending December 31, 2006, and that
 20 she would not have invested had she known.⁴⁹⁴ On cross-examination, Ms. Patricola acknowledged
 21 that the Concordia income statement she was shown did not include a balance statement, a statement

22 ⁴⁸² Tr. at 710.

23 ⁴⁸³ Tr. at 710.

24 ⁴⁸⁴ Tr. at 710.

25 ⁴⁸⁵ Tr. at 710-711, 752-754.

26 ⁴⁸⁶ Tr. at 752-753.

27 ⁴⁸⁷ Tr. at 767.

28 ⁴⁸⁸ Tr. at 711-712, 715; Exh. S-19a.

⁴⁸⁹ Tr. at 712-713.

⁴⁹⁰ Tr. at 713; Exh. S-19b.

⁴⁹¹ Tr. at 715.

⁴⁹² Tr. at 715.

⁴⁹³ Tr. at 715.

⁴⁹⁴ Tr. at 716-717.

1 of cash flows, or auditor's notes, all things she would want to see to have a comprehensive view of the
 2 financial condition of a company.⁴⁹⁵ Ms. Patricola testified that a March 6, 2009 letter from Concordia
 3 was the first she had heard that Concordia had a record number of voluntary repossessions between
 4 July 2007 and June 2008, information that would have kept her from investing had she known.⁴⁹⁶ The
 5 March 6, 2009 letter also stated that in January 2008, three competitors of Concordia "shut their doors,"
 6 information that would have led Ms. Patricola not to invest had she known.⁴⁹⁷ On cross-examination,
 7 Ms. Patricola acknowledged that, based on her business experience, competitors going out of business
 8 could be good for a company if it can absorb some of that business or inexpensively acquire assets that
 9 come to market, depending on the circumstances and whether the company in question was in a similar
 10 situation.⁴⁹⁸

11 Ms. Patricola testified that she wrote a letter in response to the March 6, 2009 Concordia letter,
 12 wherein she asked for the return of her investment.⁴⁹⁹ Ms. Patricola testified that after some effort she
 13 was able to speak with Mr. Crowder by phone and he said Concordia did not have the money to return
 14 her investment.⁵⁰⁰ Ms. Patricola testified that she talked about the letter with Mr. Bersch, who told her
 15 that he was unaware of Concordia's being in financial trouble and stopped taking her calls.⁵⁰¹ Ms.
 16 Patricola testified that she received an Amendment to Servicing Agreement in the mail from
 17 Concordia.⁵⁰² Ms. Patricola testified that she was not asked for input on the amendment, it was not
 18 negotiable, and that she had no choice but to sign because Mr. Crowder told her she wouldn't be paid
 19 any money going forward if she did not sign.⁵⁰³ Ms. Patricola testified that she never received anything
 20 in exchange for signing the First Amendment.⁵⁰⁴

21 Ms. Patricola testified that she received a Second Amendment to the Servicing Agreement from
 22 Concordia.⁵⁰⁵ Ms. Patricola testified that Concordia asked her input about the terms of the amendment

23 ⁴⁹⁵ Tr. at 741-742, 754-755.

24 ⁴⁹⁶ Tr. at 718-719; Exh. S-191.

25 ⁴⁹⁷ Tr. at 718; Exh. S-191.

26 ⁴⁹⁸ Tr. at 749-750.

27 ⁴⁹⁹ Tr. at 719; Exh. S-192.

28 ⁵⁰⁰ Tr. at 720-721.

⁵⁰¹ Tr. at 721-722.

⁵⁰² Tr. at 722; Exh. S-19c.

⁵⁰³ Tr. at 722-723.

⁵⁰⁴ Tr. at 766.

⁵⁰⁵ Tr. at 723.

1 by giving her an option as to whether she would receive a return of 45 or 50 percent of her
 2 investment.⁵⁰⁶ Ms. Patricola testified that she initially did not respond regarding the Second
 3 Amendment, but eventually she signed it because Concordia would not have given any money back if
 4 she refused.⁵⁰⁷ Ms. Patricola testified that she never received anything in exchange for signing the
 5 Second Amendment.⁵⁰⁸ Ms. Patricola testified that she felt “cheated and duped” by Mr. Bersch and
 6 Concordia who did not give her all the facts about the failing contracts, especially at the time of her
 7 second investment.⁵⁰⁹

8 Ms. Patricola testified that the Servicing Agreement stated that the truck contracts would be
 9 considered lower grade under industry standards and that she understood that they would be considered
 10 subprime loans.⁵¹⁰ Ms. Patricola testified that she considers annuities to be risk-free investments and
 11 that she believed Concordia was a risk-free investment as she was assured that it was.⁵¹¹ Ms. Patricola
 12 acknowledged that under the terms of the Second Amendment, “55% of the investment balance as of
 13 February 1, 2009, is hereby cancelled as a bad debt as there is no reasonable possibility that any
 14 enforced collection efforts will result in the cancelled amount of the Agreement being covered.”⁵¹² Ms.
 15 Patricola further acknowledged that, under the terms of the Second Amendment, she released
 16 Concordia and “its officers, directors, agents and employees from any and all liability under the original
 17 Agreement” except as amended by the Second Amendment.⁵¹³ Ms. Patricola testified that she
 18 understood that if sufficient investors did not sign the Second Amendment, a likely outcome for
 19 Concordia would have been bankruptcy.⁵¹⁴ Ms. Patricola testified that it would be possible that if
 20 Concordia had gone into bankruptcy, then the investors may not have received any money back at
 21 all.⁵¹⁵

22 Ms. Patricola testified that she was interviewed by Division investigator Gary Clapper on March
 23

24 ⁵⁰⁶ Tr. at 723-724.

⁵⁰⁷ Tr. at 724.

25 ⁵⁰⁸ Tr. at 766.

⁵⁰⁹ Tr. at 724-725.

26 ⁵¹⁰ Tr. at 728.

⁵¹¹ Tr. at 728-729.

27 ⁵¹² Tr. at 730; Exh. S-19d.

⁵¹³ Tr. at 730; Exh. S-19d.

28 ⁵¹⁴ Tr. at 731.

⁵¹⁵ Tr. at 756-757.

1 14, 2013, at which time she told him that she was not aware of any fees being paid to the Custodian for
 2 the truck titles.⁵¹⁶ However, the Custodial Agreement stated that Concordia would pay the Custodian,
 3 ER Financial, a Custodian fee of .025% per month of the principal balance.⁵¹⁷ A written Memorandum
 4 by Mr. Clapper documenting his interview with Ms. Patricola stated that she told Mr. Clapper that she
 5 spoke with an attorney prior to the interview and that she had referred four other people to Mr. Bersch
 6 about the Concordia investment, for which he paid her “a small amount.”⁵¹⁸ In her testimony, Ms.
 7 Patricola denied making these statements, denied ever referring another investor or receiving any form
 8 of finder’s fee, and denied having any agreement with the Division as to not being charged if she
 9 testified.⁵¹⁹

10 Ms. Patricola testified that she was interviewed again by Mr. Clapper on or about March 19,
 11 2015.⁵²⁰ Ms. Patricola stated at the interview, and affirmed in her testimony, that she learned about the
 12 investment opportunity from Lisa Fuhrman.⁵²¹ Mr. Clapper’s notes from the March 19, 2015 interview
 13 indicated that Ms. Patricola did not consider the statement that the Concordia product had been
 14 “approved by Kansas City Life Ins., Broker Sunset Financial” as being information that made her think
 15 it was a good investment.⁵²²

16 Ms. Patricola testified that she never claimed any losses from Concordia on her tax returns.⁵²³
 17 Ms. Patricola testified that the Division never told her about restitution from this case, but she hoped
 18 to see the return of her investment.⁵²⁴

19 Ms. Patricola testified that she and her husband had investment experience in 401(k) accounts
 20 through their employers and that her husband had purchased stock from his employer.⁵²⁵ Ms. Patricola
 21 testified that at the time she made her investment, her net worth would have been less than \$1,000,000,
 22 her annual income would have been less than \$200,000, and her combined annual income with her
 23

24 ⁵¹⁶ Tr. at 732; Exh. ER-10.

⁵¹⁷ Tr. at 733; Exh. S-19b.

25 ⁵¹⁸ Exh. ER-10 at ACC014411.

⁵¹⁹ Tr. at 735, 765.

26 ⁵²⁰ Tr. at 736; Exh. ER-11.

⁵²¹ Tr. at 736-737; Exh. ER-11.

27 ⁵²² Tr. at 737; Exh. ER-11.

⁵²³ Tr. at 739.

28 ⁵²⁴ Tr. at 739-740.

⁵²⁵ Tr. at 747, 751-752.

1 husband would have been less than \$300,000.⁵²⁶

2 Alan Craig Mason, Jr.

3 Mr. Mason testified that he is employed as senior vice president, general counsel, and secretary
4 of Kansas City Life, and secretary of Sunset Financial.⁵²⁷ Mr. Mason testified that he joined Kansas
5 City Life and Sunset Financial in 2006, and that he has been general counsel for Kansas City Life for
6 the last ten years and secretary of Sunset Financial for the last seven years.⁵²⁸ Mr. Mason testified that
7 Sunset Financial is a wholly owned subsidiary of Kansas City Life, but it is a separate legal entity.⁵²⁹
8 Mr. Mason testified that currently Sunset Financial is an underwriting broker-dealer and distributor of
9 variable universal life products for its parent, Kansas City Life. Mr. Mason testified that prior to 2012,
10 Sunset Financial was a retail broker-dealer that sold various products, all securities, through a network
11 of registered representatives.⁵³⁰

12 Mr. Mason testified that, in approximately October 2012, he was contacted by the Division
13 regarding a flyer used by Concordia in relation to an investment involving truck contracts which stated
14 that the investment was a product approved by Kansas City Life and that the broker was Sunset
15 Financial.⁵³¹ Mr. Mason testified that after receiving the flyer, Kansas City Life conducted an
16 investigation and found no record of the flyer or any knowledge of the Concordia product, although
17 the company's due diligence officer, Kim Kirkman, had reviewed the product.⁵³² Mr. Mason testified
18 that in 2000, Mr. Kirkman had the title of director of products and sales and that he did due diligence
19 to determine whether Sunset Financial would permit its representatives to sell offerings other than the
20 company's own proprietary products.⁵³³ Mr. Mason testified that Sunset Financial, upon the request
21 of certain representatives, would enter an agreement with certain alternative investments.⁵³⁴ Mr. Mason
22 testified that Mr. Kirkman traveled to California and met briefly with Ken Crowder, but he did not
23

24 ⁵²⁶ Tr. at 761.

25 ⁵²⁷ Tr. at 792-793.

26 ⁵²⁸ Tr. at 793, 1774-1775.

27 ⁵²⁹ Tr. at 793, 805.

28 ⁵³⁰ Tr. at 794, 799.

⁵³¹ Tr. at 794.

⁵³² Tr. at 794-796, 809.

⁵³³ Tr. at 1781-1782.

⁵³⁴ Tr. at 1783.

1 approve any Concordia investment.⁵³⁵ Mr. Mason testified that Mr. Kirkman was discharged from
 2 Sunset Financial on October 12, 2012, in part due to an SEC review of Sunset Financial's due diligence
 3 procedures relating to private placement products, and in part due to a FINRA investigation of Mr.
 4 Kirkman's due diligence practices, which were found to include issues of inadequate documentation
 5 pursuant to a letter of acceptance, waiver and consent ("AWC") between FINRA and Sunset
 6 Financial.⁵³⁶ Among the findings of the AWC, Sunset Financial delegated nearly all due diligence
 7 responsibilities for private placements to Mr. Kirkman, and the company had in place inadequate
 8 supervision of the due diligence and sales of private placements.⁵³⁷ Mr. Mason testified that no
 9 individual disciplinary action was raised against Mr. Kirkman, but he was criticized under the AWC
 10 for failing to maintain materials from his due diligence investigation that he should have kept and for
 11 failing to identify when the product became less profitable so as to stop sales.⁵³⁸

12 Mr. Mason testified that Sunset Financial discovered that three customers had purchased the
 13 Concordia product but could not determine whether they were purchased directly through Sunset
 14 Financial or from a registered representative.⁵³⁹ Mr. Mason testified that he believed the registered
 15 representative, Randolph Albers, had "sold away" the three Concordia investments, meaning that he sold
 16 a product not approved by Sunset Financial, although Sunset Financial required him to report the sales
 17 after becoming aware of them.⁵⁴⁰ Mr. Mason testified that Sunset Financial had records showing Mr.
 18 Albers had first reported Concordia sales on his compliance questionnaire in 2003, but the company
 19 did not have any earlier compliance questionnaires based on their document retention policies.⁵⁴¹ Mr.
 20 Mason testified that based on Sunset Financial's document destruction practice for closed accounts, he
 21 could not determine whether other investors whose accounts had been closed prior to 2003 may have
 22 purchased the Concordia product.⁵⁴² Mr. Mason testified that no documentation was found that Sunset
 23 Financial had ever approved of the investments sold by Concordia or that Kansas City Life ever
 24

25 ⁵³⁵ Tr. at 804, 810, 816.

26 ⁵³⁶ Tr. at 820-821, 1786-1787; Exh. C-30.

27 ⁵³⁷ Tr. at 1789-1794; Exh. C-31.

28 ⁵³⁸ Tr. at 1794-1795.

⁵³⁹ Tr. at 796.

⁵⁴⁰ Tr. at 798-799, 811-812, 823, 827.

⁵⁴¹ Tr. at 812-813.

⁵⁴² Tr. at 808-809.

1 approved Sunset Financial to sell them.⁵⁴³ Mr. Mason testified that if the Concordia product had been
 2 approved, it should have been within the minutes for Sunset Financial, which have been kept at least
 3 as far back as 2000, but the minutes make no mention of it.⁵⁴⁴ Mr. Mason testified that the Kansas City
 4 Life minutes do not mention the Concordia product either.⁵⁴⁵ Mr. Mason testified that Mr. Albers, as
 5 a registered representative or, later, as a branch manager, could not approve products for Sunset
 6 Financial to sell without approval from higher up in the company.⁵⁴⁶ Mr. Mason testified that Sunset
 7 Financial would not have sold the Concordia product without entering into a selling agreement.⁵⁴⁷ Mr.
 8 Mason testified that Sunset Financial did not appear to have received any commissions for the sale of
 9 Concordia investments.⁵⁴⁸ Mr. Mason testified that he was not aware of documents admitted in the
 10 case which showed that Sunset Financial had received payments from Concordia for selling the
 11 product.⁵⁴⁹

12 On cross-examination, Mr. Mason testified that Mr. Albers had reported the sale of Concordia
 13 secured notes under securities activity in his 2001 annual representative survey.⁵⁵⁰ In questionnaires
 14 submitted by Mr. Albers to Sunset Financial in 2006, 2007, and 2008, Mr. Albers listed Concordia
 15 products among the private investments he was selling which have been approved by Sunset
 16 Financial.⁵⁵¹ Mr. Mason testified that Sunset Financial knew that the Concordia product was being
 17 sold as an outside business activity.⁵⁵² Mr. Mason testified that it would have been Sunset Financial's
 18 job to tell Mr. Albers that a product he reported as being approved was, in fact, not approved and to
 19 investigate the matter.⁵⁵³ Mr. Mason testified that Sunset Financial did not tell Mr. Albers that the
 20 Concordia product had not been approved by the company after the 2006, 2007, or 2008
 21 questionnaires.⁵⁵⁴ Mr. Mason testified that the three clients to whom Mr. Albers' sold the Concordia
 22

23 ⁵⁴³ Tr. at 796-798.

24 ⁵⁴⁴ Tr. at 818-819.

25 ⁵⁴⁵ Tr. at 819.

26 ⁵⁴⁶ Tr. at 819.

27 ⁵⁴⁷ Tr. at 806.

28 ⁵⁴⁸ Tr. at 797.

⁵⁴⁹ Tr. at 807.

⁵⁵⁰ Tr. at 1819-1824, 1839, 1841-1842; Exh. ER-15 at ACC011519, ACC011521-ACC011522.

⁵⁵¹ Tr. at 1825-1827, 1839-1840; Exh. ER-15 at ACC011523-ACC011525.

⁵⁵² Tr. at 1827-1828.

⁵⁵³ Tr. at 1844-1845.

⁵⁵⁴ Tr. at 1847.

1 product were not contacted by Sunset Financial regarding the Concordia product.⁵⁵⁵ Mr. Mason
 2 testified that the sale of Concordia's investment product by Mr. Albers was considered by Sunset
 3 Financial as the sale of a security.⁵⁵⁶

4 Mr. Mason testified that Sunset Financial did not have a copy of a selling agreement with
 5 Concordia and ER Financial, which Sunset Financial would have expected to find in its binder
 6 containing information they had related to Concordia.⁵⁵⁷ In reviewing the selling agreement from
 7 Concordia's records, Mr. Mason testified that, based upon his experience, he did not understand why
 8 sales would be limited to accredited investors if the Concordia investments were not securities.⁵⁵⁸ Mr.
 9 Mason testified that he did not know what conclusion to draw from seeing a draft selling agreement
 10 with Concordia signed by Greg Smith, the president of Sunset Financial from the 1990s through
 11 approximately 2005.⁵⁵⁹ Mr. Mason testified that Mr. Kirkman would have reported to Mr. Smith in
 12 June 2000.⁵⁶⁰ Mr. Mason testified that he would not know if the draft selling agreement had actually
 13 been signed by Sunset Financial, but Sunset Financial did not have a copy of the document in its files.⁵⁶¹
 14 Mr. Mason testified that the form did not look like a selling agreement used by Sunset Financial,
 15 although he is only familiar with the forms used since 2006.⁵⁶² Mr. Mason testified that he had not
 16 spoken with Greg Smith about Concordia.⁵⁶³ Mr. Mason testified that in his experience as an attorney,
 17 he never had clients sign documents marked as drafts.⁵⁶⁴

18 On cross-examination, Mr. Mason testified that, contrary to statements he made in a July 12,
 19 2013 letter to the Division, Mr. Albers was employed by Sunset Financial at the time he sold the
 20 Concordia product, however, Mr. Mason believed that the sales were not made through Sunset
 21 Financial.⁵⁶⁵ Mr. Mason testified that he did not believe Sunset Financial entered into the selling
 22

23 ⁵⁵⁵ Tr. at 1845.

24 ⁵⁵⁶ Tr. at 1840.

25 ⁵⁵⁷ Tr. at 800, 803, 817, 823-824.

26 ⁵⁵⁸ Tr. at 800-801.

27 ⁵⁵⁹ Tr. at 802-803, 1836.

28 ⁵⁶⁰ Tr. at 821.

⁵⁶¹ Tr. at 803.

⁵⁶² Tr. at 815-816, 822.

⁵⁶³ Tr. at 804, 811.

⁵⁶⁴ Tr. at 804.

⁵⁶⁵ Tr. at 1796-1803; Exhs. ER-15 at ACC011412, C-32.

1 agreement, dated June 2000, with Concordia and ER Financial.⁵⁶⁶ Mr. Mason testified that he was not
 2 aware of any products that Sunset Financial may have sold where sales were limited to accredited
 3 investors other than securities.⁵⁶⁷ Under the terms of the selling agreement, investors were defined as
 4 being accredited investors who purchase Contracts and execute Service Agreements.⁵⁶⁸ Mr. Mason
 5 testified that Sunset Financial had documents from Concordia that were dated as far back as January 1,
 6 2000, but that Sunset Financial was not sure when those documents were received.⁵⁶⁹ Mr. Mason
 7 testified that the first private placement approved by Sunset Financial was in 2001, and prior to that
 8 Sunset Financial would not have had the experience or procedures in place to approve a private
 9 placement.⁵⁷⁰ Mr. Mason testified that he did not have access to either the emails or calendars of Mr.
 10 Kirkman and Mr. Smith from the year 2000.⁵⁷¹ Mr. Mason testified that he had no records of a 2000
 11 or 2001 meeting in the offices of Kansas City Life with Mr. Bersch, Mr. Wanzek, and Mr. Albers,
 12 although Mr. Mason admitted he would not have records of calendars from that time.⁵⁷² Under the
 13 terms of the selling agreement, Concordia was to pay the seller a fee of one percent within ten days of
 14 receipt of the investor's purchase payment and an additional 0.125 percent of the purchase price for
 15 each month the investor remained invested.⁵⁷³

16 Sunset Financial received a \$2,000 finder's fee check for Randy Albers and a cover letter from
 17 Concordia, both dated October 30, 2000, in reference to Pierce, an investor who made an investment
 18 of \$200,000 on October 23, 2000.⁵⁷⁴ Mr. Mason testified that Sunset Financial would have processed
 19 the check and taken a share as the company "take[s] a haircut on all money that flows through [its]
 20 books," which would have been consistent with the poor procedures cited by FINRA in the AWC.⁵⁷⁵
 21 Mr. Mason testified that he did not believe it was possible that the processing of the check indicated
 22 that the Concordia product was approved pursuant to a selling agreement that could not now be found,

23
 24 ⁵⁶⁶ Tr. at 1803-1804; Exh. ER-12.

⁵⁶⁷ Tr. at 1842-1843.

25 ⁵⁶⁸ Tr. at 1842; Exh. ER-12.

⁵⁶⁹ Tr. at 1804-1806; Exh. ER-15 at ACC011418.

26 ⁵⁷⁰ Tr. at 1833-1834.

⁵⁷¹ Tr. at 1832-1833.

27 ⁵⁷² Tr. at 1835-1836.

⁵⁷³ Tr. at 1806-1807; Exh. ER-12.

28 ⁵⁷⁴ Tr. at 1803, 1808; Exhs. ER-15 at ACC011537-ACC011538, S-148a.

⁵⁷⁵ Tr. at 1809-1810.

1 although he admitted he could not say that the entirety of the documents provided to Mr. Kirkman in
 2 2000 would have still been in existence when Mr. Mason started looking for them.⁵⁷⁶ Sunset Financial
 3 received a \$750 check and cover letter from Concordia, dated January 9, 2003, which gave an itemized
 4 breakdown for commissions, from the month of December, in the amount of \$250 each for Foutz,
 5 Ferris, and Pierce, which would reflect 0.125 percent of the purchase price of \$200,000 for each of
 6 these three investors.⁵⁷⁷ Mr. Mason testified that this check would also have been deposited and Mr.
 7 Albers paid his share.⁵⁷⁸ Sunset Financial's trades blotter indicated that Sunset Financial received \$750
 8 checks from Concordia, as a product sponsor, for Randy Albers from January 31, 2003 through January
 9 1, 2007, with payments continuing at slightly different amounts through February 13, 2009, for a total
 10 of \$54,873.⁵⁷⁹ Mr. Mason testified that with all these checks, Sunset Financial would deposit them,
 11 take its share, and then pay Randy Albers.⁵⁸⁰ Mr. Mason testified that Sunset Financial would not have
 12 information from the trades blotter prior to January 2003, because of a change in electronics systems
 13 that the company made about that time.⁵⁸¹ Mr. Mason testified that Sunset Financial never conducted
 14 an investigation into Mr. Albers related to Concordia and that while Mr. Albers was terminated for
 15 selling away, the termination was not related to Concordia.⁵⁸²

16 Mr. Mason testified that the documents he sent to the Division were gathered from looking at
 17 all the files at Sunset Financial that would reference Concordia, the blotter, and Mr. Albers' fire file.⁵⁸³
 18 Mr. Mason testified that in compiling the documents, he spoke with Mr. Kirkman and Kelly Ullom,
 19 Sunset Financial's current president and former Chief Compliance Officer, with Mr. Ullom also having
 20 spoken with Susie Denny, who at the time was vice president of operations, but who had been in the
 21 compliance department in 2000 and was the vice president of compliance when Mr. Albers submitted
 22 his 2001 annual representative survey.⁵⁸⁴

23 ...

24 ⁵⁷⁶ Tr. at 1810-1811, 1813.

25 ⁵⁷⁷ Tr. at 1813-1815; Exhs. ER-15 at ACC011541-ACC011543, S-115a, S-133a, S-148a.

⁵⁷⁸ Tr. at 1814.

26 ⁵⁷⁹ Tr. at 1815-1818; Exh. ER-15 at ACC011527-ACC011528.

⁵⁸⁰ Tr. at 1818.

27 ⁵⁸¹ Tr. at 1848.

⁵⁸² Tr. at 1818-1819.

28 ⁵⁸³ Tr. at 1779-1780.

⁵⁸⁴ Tr. at 1777, 1779-1780, 1828-1829, 1839; Exh. ER-15 at ACC011521.

1 Kathleen Hodel

2 Ms. Hodel testified that she is a retiree living in Lake Havasu City, Arizona, since 1990, having
 3 previously worked in management at AT&T for seventeen years.⁵⁸⁵ Ms. Hodel testified that her
 4 husband, Donald Hodel, had owned a termite business in the Los Angeles area.⁵⁸⁶ Ms. Hodel testified
 5 that after retiring to Lake Havasu City, she and her husband owned and managed three small apartment
 6 buildings which they acquired in 1990 through an exchange of an apartment building they had owned
 7 in California.⁵⁸⁷ Ms. Hodel testified that she first learned about Concordia from her accountant, Mr.
 8 Bersch, and that she and her husband made their first purchase in October 1999.⁵⁸⁸ Ms. Hodel testified
 9 that she trusted Mr. Bersch as he was her accountant.⁵⁸⁹ Ms. Hodel testified that Mr. Bersch did her
 10 taxes for a number of years and that Mr. Wanzek took over and does them to this day.⁵⁹⁰ Ms. Hodel
 11 testified that Mr. Bersch described the investment as Concordia purchasing truck loans and charging
 12 truckers high interest.⁵⁹¹ Ms. Hodel testified that she felt secure knowing that the trucks were collateral
 13 and that Concordia guaranteed that if a loan defaulted it would be replaced, plus other people in the
 14 community were investing through Mr. Bersch.⁵⁹² Ms. Hodel testified that she received a one-page
 15 brochure about Concordia from Mr. Bersch.⁵⁹³ Ms. Hodel testified that information in the brochure
 16 made the Concordia investment appealing to her: it offered a high rate of interest, principle had doubled
 17 in under six years, it was guaranteed, it offered a monthly check, and they had a large number of trucks
 18 in California.⁵⁹⁴ Ms. Hodel testified that she also received a flow chart about the investment from
 19 either Mr. Bersch or Concordia.⁵⁹⁵ Ms. Hodel testified that she understood Mr. Bersch would be the
 20 Custodian for the account, keeping the contracts and the titles in his possession.⁵⁹⁶ Ms. Hodel testified
 21 that Mr. Bersch did not mention whether he would receive any fee for holding the contracts and titles,

22 _____
 23 ⁵⁸⁵ Tr. at 942-943, 969-970.

⁵⁸⁶ Tr. at 942-943.

24 ⁵⁸⁷ Tr. at 943, 970-971, 1004-1005.

⁵⁸⁸ Tr. at 944.

25 ⁵⁸⁹ Tr. at 944-945.

⁵⁹⁰ Tr. at 976.

26 ⁵⁹¹ Tr. at 945.

⁵⁹² Tr. at 945-946.

27 ⁵⁹³ Tr. at 946-947; Exh. S-189.

⁵⁹⁴ Tr. at 949; Exh. S-189.

28 ⁵⁹⁵ Tr. at 949; Exh. S-241.

⁵⁹⁶ Tr. at 950-951.

1 or whether he would receive a fee or commission if she invested.⁵⁹⁷ On cross-examination, Ms. Hodel
 2 testified that she understood the Custodian would receive a fee from Concordia in the amount of 0.25%
 3 per month of the principal balance, pursuant to the terms of the Custodial Agreement she signed in
 4 connection with her investment.⁵⁹⁸ Ms. Hodel testified that Mr. Bersch did not mention any risks
 5 involved in the Concordia investment.⁵⁹⁹ On cross-examination, Ms. Hodel testified that she
 6 understood any investment has risk although she did not believe that a higher interest rate meant a
 7 higher risk in this case because collateral was present.⁶⁰⁰ Ms. Hodel testified that since Mr. Bersch was
 8 her accountant, she assumed he knew her net worth before she invested.⁶⁰¹ Ms. Hodel testified that at
 9 the time she and her husband invested, their net worth, excluding their home, was greater than \$1
 10 million.⁶⁰²

11 Ms. Hodel testified that she and her husband invested in Concordia five times, selling different
 12 pieces of property to make the investments.⁶⁰³ Ms. Hodel testified that in the beginning, there was no
 13 question that they could afford to invest in Concordia, while towards the end of her investments, Mr.
 14 Bersch expressed that they should diversify, but since they still owned income producing property,
 15 they determined that it would be okay to continue to invest in Concordia.⁶⁰⁴

16 Ms. Hodel testified that before investing in Concordia, she had no prior experience with the
 17 trucking business, or in financing and collecting commercial loans.⁶⁰⁵ Ms. Hodel testified that
 18 Concordia would be a passive investment for her and her husband, with them having no role in
 19 Concordia's business.⁶⁰⁶ Ms. Hodel testified that she and her husband planned on the Concordia
 20 interest to be their retirement income, replacing their income stream from the rental properties.⁶⁰⁷

21 Ms. Hodel and her husband entered a Servicing Agreement on October 6, 1999, reflecting an
 22

23 ⁵⁹⁷ Tr. at 951.

24 ⁵⁹⁸ Tr. at 976-977; Exh. S-24b.

25 ⁵⁹⁹ Tr. at 951.

26 ⁶⁰⁰ Tr. at 972-973.

27 ⁶⁰¹ Tr. at 951.

28 ⁶⁰² Tr. at 951-952.

⁶⁰³ Tr. at 952.

⁶⁰⁴ Tr. at 952-953.

⁶⁰⁵ Tr. at 953.

⁶⁰⁶ Tr. at 953-954.

⁶⁰⁷ Tr. at 954.

1 investment of \$75,000 at a 12% interest rate.⁶⁰⁸ Ms. Hodel testified that she and her husband also
 2 signed a Custodial Agreement, dated October 6, 1999, in connection with this investment.⁶⁰⁹ Ms. Hodel
 3 testified that she and her husband entered into another Servicing Agreement on October 19, 2001,
 4 reflecting an investment of \$100,000 at a 12% interest rate.⁶¹⁰ Ms. Hodel testified that she and her
 5 husband also signed a Custodial Agreement, dated October 19, 2001, in connection with this
 6 investment.⁶¹¹ Ms. Hodel testified that she and her husband entered into a third Servicing Agreement
 7 on February 13, 2004, reflecting an investment of \$100,000.⁶¹² Ms. Hodel testified that she and her
 8 husband entered into a fourth Servicing Agreement on January 10, 2005, reflecting an investment of
 9 \$100,000.⁶¹³ Ms. Hodel testified that she and her husband also signed a Custodial Agreement, dated
 10 January 10, 2005, in connection with this investment.⁶¹⁴ Ms. Hodel testified that she made a fifth and
 11 final investment of \$100,000 in October 2005.⁶¹⁵ Ms. Hodel testified that her five investments were
 12 held in two accounts, one containing \$100,000 and a bundled account containing \$400,000.⁶¹⁶ Ms.
 13 Hodel testified that when she made her investments, she gave her checks to Mr. Bersch.⁶¹⁷ Ms. Hodel
 14 testified that she never gave written permission to Mr. Bersch or ER Financial for the disposition or
 15 release of the contracts and title assignments associated with any of her Servicing Agreements.⁶¹⁸

16 Ms. Hodel testified that the Concordia investment worked well for her from 1999 through 2008,
 17 as she received monthly checks and she recommended the investment to friends because of the high
 18 interest rate.⁶¹⁹ Ms. Hodel testified that she received payments from Concordia of at least \$360,000 on
 19 the bundled account and \$47,000 from the smaller account, for a total of at least \$407,000.⁶²⁰ Ms.
 20 Hodel testified that she did not provide the Division with the paperwork documenting her payments,
 21

22 ⁶⁰⁸ Tr. at 955, 973, 1013; Exh. S-24a. Ms. Hodel testified that an additional \$25,000 was added to this investment in March
 2001, also at a 12% interest rate. Tr. at 981, 1013-1014.

23 ⁶⁰⁹ Tr. at 956; Exh. S-24b.

24 ⁶¹⁰ Tr. at 957, 1014; Exh. S-24c.

25 ⁶¹¹ Tr. at 957; Exh. S-24d.

26 ⁶¹² Tr. at 958; Exh. S-24g.

27 ⁶¹³ Tr. at 958-959; Exh. S-24h.

28 ⁶¹⁴ Tr. at 959, 1014-1015; Exh. S-24i.

⁶¹⁵ Tr. at 984.

⁶¹⁶ Tr. at 979-980.

⁶¹⁷ Tr. at 966.

⁶¹⁸ Tr. at 955-956.

⁶¹⁹ Tr. at 959-960, 973-974.

⁶²⁰ Tr. at 992, 996-997, 999.

1 nor was she asked for it.⁶²¹ Ms. Hodel testified that she also made withdrawals from her accounts of
 2 \$29,000 in November 2006 and \$14,000 in April 2008.⁶²² Ms. Hodel testified that she received back
 3 approximately the \$500,000 that she had invested in Concordia.⁶²³ Ms. Hodel testified that her
 4 understanding was that at some point she would be able to receive her \$500,000 investment principal
 5 back, not counting the interest paid.⁶²⁴ Ms. Hodel testified that she would not have invested in
 6 Concordia had she known that: she would only receive her \$500,000 back over the years, that the
 7 collateral would not be available, that the interest payments were not guaranteed, or that her principal
 8 amount was not guaranteed.⁶²⁵ Ms. Hodel testified that in February 2009 she received an amendment
 9 from Concordia.⁶²⁶ Ms. Hodel testified that prior to receiving the amendment, she did not receive any
 10 information from Concordia that the company was having financial trouble, nor was she contacted for
 11 input regarding amending her investment.⁶²⁷ Ms. Hodel testified that she was not offered anything by
 12 Concordia in exchange for signing the amendment and that she was not given an opportunity to
 13 negotiate the terms of the amendment.⁶²⁸ Ms. Hodel testified that she talked with Mr. Bersch about the
 14 amendment and was told that she would not receive any payments if she did not sign it.⁶²⁹ Ms. Hodel
 15 testified that beginning in 2009 she received principal payments from Concordia which continued
 16 through June 2013.⁶³⁰

17 Ms. Hodel testified that she received and signed a Second Amendment from Concordia that
 18 said she would receive 45% of her principal with 55% being cancelled as bad debt.⁶³¹ Ms. Hodel
 19 testified that she spoke with Mr. Bersch about the Second Amendment, and he encouraged her to sign
 20 it because it would be better for her to receive 45% than nothing.⁶³² Ms. Hodel testified that she
 21 understood not signing the Second Amendment meant Concordia would not return any more of her
 22

23 ⁶²¹ Tr. at 1001.

24 ⁶²² Tr. at 1001-1003.

25 ⁶²³ Tr. at 1016-1017, 1020.

26 ⁶²⁴ Tr. at 1019.

27 ⁶²⁵ Tr. at 1021.

28 ⁶²⁶ Tr. at 960; Exh. S-24e.

⁶²⁷ Tr. at 960-961.

⁶²⁸ Tr. at 961.

⁶²⁹ Tr. at 962-963.

⁶³⁰ Tr. at 974-975.

⁶³¹ Tr. at 963-964; Exh. S-24f.

⁶³² Tr. at 964.

1 money and that she had no choice but to sign the First and Second Amendments.⁶³³ Ms. Hodel testified
2 that she felt Concordia had been less than transparent with her and did not act in her best interest.⁶³⁴

3 Ms. Hodel testified that for two years she claimed losses from Concordia on her taxes in the
4 amount of \$3,000 each year.⁶³⁵

5 Ms. Hodel testified that in addition to the apartment buildings, she and her husband owned a
6 commercial building in 1999 that they recently sold for \$300,000.⁶³⁶ Ms. Hodel testified that in 1999,
7 she and her husband also had a joint investment account in stocks worth approximately \$60,000, and
8 individual IRA accounts.⁶³⁷

9 Avi Beliak

10 Mr. Beliak testified that he is a forensic accountant employed by the Division for the past two
11 years.⁶³⁸ Mr. Beliak testified that he has a bachelor's of science degree in accountancy, that he holds
12 a certified public accounting certificate from the State of Arizona, and that he is a certified fraud
13 examiner by the Association of Certified Fraud Examiners.⁶³⁹ Mr. Beliak testified that he has
14 experience preparing financial summaries while with the Division and in prior practice working at
15 accounting firms that specialized in forensic accounting.⁶⁴⁰ Mr. Beliak testified that he had examined
16 numerous documents pertaining to this case that were provided by Concordia and information obtained
17 through the course of the Division's investigation including investor memos, questionnaires, and
18 interviews.⁶⁴¹ Mr. Beliak testified that from his review of these documents he prepared summaries of
19 approximately 1,500 pages of documents showing: Custodian fees paid to ER Financial and to Linda
20 Wanzek from 2004 through January 2009; finder's fees paid to ER Financial by Concordia from
21 February 2004 through August 2008; and the total number of investors in Concordia from 1997 through
22 2015.⁶⁴²

23 ⁶³³ Tr. at 965.

24 ⁶³⁴ Tr. at 967.

25 ⁶³⁵ Tr. at 976.

26 ⁶³⁶ Tr. at 1007-1008.

27 ⁶³⁷ Tr. at 1008-1009.

28 ⁶³⁸ Tr. at 1024-1025.

⁶³⁹ Tr. at 1024.

⁶⁴⁰ Tr. at 1026.

⁶⁴¹ Tr. at 1025-1027, 1055, 1079. Mr. Beliak testified that he did not rely upon any documents produced by the ER Respondents. Tr. at 1056.

⁶⁴² Tr. at 1026-1028; Exh. S-194.

1 Mr. Beliak testified that from 2004 through January 2009, Concordia paid Custodian fees of
 2 over \$2.52 million to ER Financial and over \$493,000 to Linda Wanzek.⁶⁴³ Mr. Beliak testified that
 3 he did not know how much profit ER Financial may have realized from the fees.⁶⁴⁴ Mr. Beliak testified
 4 that from February 2004 through August 2008, Concordia paid over \$565,000 in finder's fees to ER
 5 Financial.⁶⁴⁵ Mr. Beliak testified that Mr. Bersch signed Custodial Agreements for 28 investors who
 6 invested a total of over \$4.7 million.⁶⁴⁶ Mr. Beliak testified that those 28 investors received payments
 7 totaling just over \$3.6 million, leaving an amount of net principal owed of over \$1.129 million.⁶⁴⁷

8 Mr. Beliak testified that Mr. Wanzek was the salesman for 19 investors who are still owed just
 9 over \$946,000.⁶⁴⁸ Mr. Beliak testified that ER Financial was the salesperson for 12 investors who are
 10 still owed approximately \$568,000.⁶⁴⁹ Mr. Beliak testified that the total amount owed to investors is a
 11 little over \$2.643 million.⁶⁵⁰ Mr. Beliak testified that another 85 investors in Concordia have been fully
 12 repaid.⁶⁵¹ Mr. Beliak testified that Concordia claims that the principal amount still owed to investors
 13 is a little over \$2.296 million, approximately \$347,000 less than the amount Mr. Beliak has identified
 14 as being owed.⁶⁵² Mr. Beliak testified that the Division requested documents from Concordia
 15 demonstrating how the company reached its totals, but they were not provided.⁶⁵³

16 Mr. Beliak testified that the difference between the principal amounts as determined by the
 17 Division versus those determined by Concordia are about 40% attributable to three investors: Theresa
 18 Patricola, for whom Concordia contended there was a \$50,000 overage but the Division found that
 19 \$50,000 to be principal; Jack Guest for whom Concordia contended that over \$52,000 paid to the Guest
 20 Charitable trust should apply to the principal owed to Mr. Guest, while the Division considered these
 21 to be separate investors;⁶⁵⁴ and Kristine and Gregory Farmer for whom the Division calculated as being

22 ⁶⁴³ Tr. at 1030; Exh. S-194.

23 ⁶⁴⁴ Tr. at 1056-1057.

24 ⁶⁴⁵ Tr. at 1030; Exh. S-194.

25 ⁶⁴⁶ Tr. at 1031-1032; Exh. S-194.

26 ⁶⁴⁷ Tr. at 1032; Exh. S-194.

27 ⁶⁴⁸ Tr. at 1034; Exh. S-194.

28 ⁶⁴⁹ Tr. at 1034; Exh. S-194.

⁶⁵⁰ Tr. at 1034; Exh. S-194.

⁶⁵¹ Tr. at 1035, 1058, 1116; Exh. S-194.

⁶⁵² Tr. at 1034-1035; Exh. S-194.

⁶⁵³ Tr. at 1117-1118.

⁶⁵⁴ On cross examination, Mr. Beliak testified that he did not believe he had reviewed the trust documentation and did not recall whether the Servicing Agreement for the Guest Charitable Trust had been signed by Jack Guest. Tr. at 1066-1067.

1 owed over \$24,000, while Concordia stated they should be excluded as ER Financial insiders.⁶⁵⁵ Mr.
 2 Beliak testified that he prepared an initial summary exhibit in April 2015, but revised it based upon
 3 additional information from 2013 through 2015 and based upon additional repayment information from
 4 Concordia.⁶⁵⁶ Mr. Beliak testified that the adjustments in his revision reduced the principal amount
 5 owed to investors.⁶⁵⁷ Mr. Beliak testified that his calculations as to the amounts due to investors did
 6 not apply the terms of the Second Amendment.⁶⁵⁸ Mr. Beliak testified that the Division and Concordia
 7 disagreed on offset amounts for the following investors: the Walter T. Singleton family, Jack and Susan
 8 Schuringa, the Guest Charitable Trust, and Donald and Kathleen Hodel.⁶⁵⁹

9 Mr. Beliak testified that he did not show principal being owed to any investors by the names of
 10 LeMay, Dennison, or Duby.⁶⁶⁰ On cross-examination, Mr. Beliak testified that, regarding Concordia
 11 investors Donald and Kathleen Hodel, if evidence established that they were paid back more money
 12 than was reflected in the documents Mr. Beliak used for his summary, that money should be added to
 13 their total.⁶⁶¹ Mr. Beliak testified that his understanding of Concordia's figures showed the Hodels'
 14 investment split in two accounts with one receiving an excess repayment greater than the offset in the
 15 other.⁶⁶² Mr. Beliak testified that he had reviewed documents ranging from 1997 to 2005 in preparing
 16 this part of his summary.⁶⁶³ Mr. Beliak testified that he could not recall the earliest date for payments
 17 reflected in his summary and that he did not know whether Ms. Hodel's totals reflected payments
 18 received prior to December 31, 2003.⁶⁶⁴ Mr. Beliak testified that the records received from Concordia
 19 were potentially incomplete.⁶⁶⁵

20 Mr. Beliak testified that his list of investors would not have included Mr. Bersch or Mr.
 21 Wanzek.⁶⁶⁶ Mr. Beliak testified that he also excluded Mr. Wanzek's mother, Dorothy Wanzek, from
 22

23 ⁶⁵⁵ Tr. at 1040-1041, 1046-1048, 1050, 1092-1093, 1095; Exh. S-194.

24 ⁶⁵⁶ Tr. at 1050-1051; Exh. S-194.

25 ⁶⁵⁷ Tr. at 1087-1088.

26 ⁶⁵⁸ Tr. at 1067-1068.

27 ⁶⁵⁹ Tr. at 1136.

28 ⁶⁶⁰ Tr. at 1089-1090, 1120.

⁶⁶¹ Tr. at 1113-1114, 1135.

⁶⁶² Tr. at 1122.

⁶⁶³ Tr. at 1122-1223.

⁶⁶⁴ Tr. at 1128.

⁶⁶⁵ Tr. at 1131.

⁶⁶⁶ Tr. at 1116, 1126.

1 the list of investors as Mr. Beliak excluded known family members from the list.⁶⁶⁷

2 Gary Clapper

3 Mr. Clapper testified that he has been a special investigator for the Division since September
4 2001, until his promotion to his current position, chief investigator, in February 2014.⁶⁶⁸ Mr. Clapper
5 testified that he holds a bachelor's degree in criminal justice and administration and he started a
6 master's program before joining the Tempe Police Department from which he retired at the equivalent
7 of an officer position after twenty years.⁶⁶⁹ Mr. Clapper testified that he is a member of the
8 International Association of Financial Crimes Investigators and has attended a number of trainings with
9 NW3C and the North American Securities Association Administrators.⁶⁷⁰

10 Mr. Clapper testified that he was assigned to this case in August 2012 after a complaint was
11 received from Suellen LeMay in July 2012.⁶⁷¹ Mr. Clapper testified that as the assigned investigator,
12 he has been the custodian of records in this case and he requested documents from Mr. Bersch, Mr.
13 Wanzek, ER Financial, Concordia, a number of banks, and investors.⁶⁷² Mr. Clapper testified that after
14 initially speaking with Ms. LeMay, subpoenas were issued to Mr. Bersch, Mr. Wanzek, ER Financial,
15 and Concordia.⁶⁷³ Mr. Clapper testified that in investigating Concordia, he discovered that Concordia
16 had been conducting business in Arizona as far back as 1998, continuously through 2008.⁶⁷⁴ Mr.
17 Clapper testified that Concordia never applied with the Commission to do business in Arizona as a
18 foreign corporation.⁶⁷⁵ Mr. Clapper testified that his investigation of Mr. Bersch and Mr. Wanzek
19 determined they were both licensed with the Arizona Board of Accountancy as CPAs within
20 Arizona.⁶⁷⁶ Mr. Clapper testified that he discovered ER Financial was registered with the Commission
21 as an LLC within Arizona, organized October 9, 2001.⁶⁷⁷ Mr. Clapper testified that Mr. Bersch and
22 Mr. Wanzek had done business as ER Financial and Advisory Service before forming the LLC, as

23 ⁶⁶⁷ Tr. at 1127.

24 ⁶⁶⁸ Tr. at 1207-1208, 1417.

25 ⁶⁶⁹ Tr. at 1206-1207.

26 ⁶⁷⁰ Tr. at 1208.

27 ⁶⁷¹ Tr. at 1209, 1211-1212.

28 ⁶⁷² Tr. at 1209-1210.

⁶⁷³ Tr. at 1212.

⁶⁷⁴ Tr. at 1212-1213.

⁶⁷⁵ Tr. at 1213-1214.

⁶⁷⁶ Tr. at 1214; Exhs. S-178a, S-178b.

⁶⁷⁷ Tr. at 1215; Exh. S-166.

1 demonstrated by contracts and Custodial Agreements.⁶⁷⁸ Mr. Clapper testified that between January
 2 1, 1998, and March 10, 2015, Mr. Bersch, Mr. Wanzek, Linda Wanzek, Christopher Crowder, Kenneth
 3 Crowder, ER Financial, and Concordia were not registered with the Commission as securities dealers
 4 or salesmen.⁶⁷⁹

5 Mr. Clapper testified that the Division issued a subpoena to Concordia, who refused to produce
 6 documents because they were located in California while the subpoena operated only in Arizona.⁶⁸⁰
 7 Mr. Clapper testified that he then contacted the California Department of Corporations who issued a
 8 subpoena to Concordia for the documents.⁶⁸¹ Mr. Clapper testified that he obtained copies of all the
 9 documents that Concordia disclosed to the California Department of Corporations.⁶⁸²

10 Mr. Clapper testified that a subpoena was served by certified mail on ER Financial Services
 11 requesting internal records regarding investors and the investment.⁶⁸³ Mr. Clapper testified that counsel
 12 for Mr. Bersch, the Wanzeks, and ER Financial requested extensions to the response date before
 13 eventually declining to produce any records when Mr. Bersch and Mr. Wanzek invoked their right to
 14 remain silent under the Fifth Amendment, pursuant to a letter from their attorney dated October 26,
 15 2012.⁶⁸⁴ Mr. Clapper testified that a subpoena was issued to the custodian of records for ER Financial
 16 on November 5, 2012, seeking essentially the same information that Mr. Bersch and Mr. Wanzek did
 17 not provide, however no substantive documents were ever received from this subpoena as ER Financial
 18 had filed Articles of Termination with the Commission on October 31, 2012.⁶⁸⁵

19 Mr. Clapper testified that Mr. Bersch participated in an examination under oath on December
 20 18, 2012, where Mr. Bersch gave limited information about receiving the subpoena before invoking
 21 his Fifth Amendment privilege for the rest of the questioning.⁶⁸⁶

22 Mr. Clapper testified that he conducted or participated in interviews of investors as part of his
 23

24 ⁶⁷⁸ Tr. at 1216-1217; Exh. S-137b.

⁶⁷⁹ Tr. at 1218-1220; Exhs. S-1a – S-1g.

⁶⁸⁰ Tr. at 1221.

⁶⁸¹ Tr. at 1221; Exh. S-162.

⁶⁸² Tr. at 1222-1225; Exhs. S-181, S-182.

⁶⁸³ Tr. at 1225-1228; Exh. S-184.

⁶⁸⁴ Tr. at 1228-1231; Exhs. S-160, S-185, S-186.

⁶⁸⁵ Tr. at 1232-1235, 1444, 1557; Exhs. S-183, S-187. Mr. Clapper testified that some packing slips were received in
 27 response to the subpoenas. Tr. at 1444.

⁶⁸⁶ Tr. at 1236-1237; Exh. S-173.

1 investigation.⁶⁸⁷ Mr. Clapper testified that based on his interviews with investors, the primary
 2 salesperson of the Servicing Agreements and Custodial Agreements to Arizona investors was the
 3 person who signed the Custodial Agreement.⁶⁸⁸ Mr. Clapper testified that Chino Commercial Bank
 4 and Sunset Financial would have sold a very low number of agreements as opposed to ER Financial.⁶⁸⁹

5 Mr. Clapper testified that he received a copy of a PowerPoint presentation from investors
 6 William and Jean Pike regarding their investment in Concordia.⁶⁹⁰ The PowerPoint presentation
 7 recommended Concordia Servicing Agreements and stated that “[t]hese notes meet our client’s needs
 8 regarding safety of principal[, higher guaranteed interest[, and] liquidity.”⁶⁹¹ The PowerPoint
 9 presentation further stated that “Servicing Agreements offer two guarantees[: 1)] [i]nvestment principal
 10 is secured by collateral represented by assigned vehicle titles[, and 2)] Concordia guarantees to replace
 11 any non-performing contract with one of equal or greater value.”⁶⁹² The PowerPoint presentation stated
 12 that the Servicing Agreements paid a guaranteed 12% rate of return, however the 12% was crossed out
 13 and “10%” was written in its place.⁶⁹³ The PowerPoint presentation also stated that that “Servicing
 14 Agreements provide a safety of principal guarantee and 100% liquidity in the event of emergency
 15 need.”⁶⁹⁴ Mr. Clapper testified that he also received a PowerPoint presentation from Ms. Fuhrman a
 16 couple weeks prior to the hearing.⁶⁹⁵ This PowerPoint had a page titled “Is There A Way to Increase
 17 My Fixed Income Returns Without Undue Risk to My Principal?” with the names Michael Bersch and
 18 David Wanzek below.⁶⁹⁶ This PowerPoint has a slide similar to the one provided by William and Jean
 19 Pike which described a guaranteed 12% rate of return from the Servicing Agreements.⁶⁹⁷ The
 20 PowerPoint presentation stated that Servicing Agreements have no early withdrawal penalty and they
 21 offer 100% liquidity.⁶⁹⁸ Mr. Clapper testified that only two investors said they had seen a PowerPoint
 22

23 ⁶⁸⁷ Tr. at 1321.

24 ⁶⁸⁸ Tr. at 1321-1322.

25 ⁶⁸⁹ Tr. at 1322, 1382.

26 ⁶⁹⁰ Tr. at 1323; Exh. S-13h.

27 ⁶⁹¹ Tr. at 1327; Exh. S-13h at ACC004306.

28 ⁶⁹² Tr. at 1327-1328; Exh. S-13h at ACC004308.

⁶⁹³ Tr. at 1328; Exh. S-13h at ACC004310.

⁶⁹⁴ Tr. at 1329; Exh. S-13h at ACC004312.

⁶⁹⁵ Tr. at 1336-1337; Exh. S-193.

⁶⁹⁶ Tr. at 1337-1338; Exh. S-193 at ACC015224.

⁶⁹⁷ Tr. at 1338-1339; Exh. S-193 at ACC015231.

⁶⁹⁸ Tr. at 1339; Exh. S-193 at ACC015232-ACC015232.

1 presentation, one of whom was Suellen LeMay.⁶⁹⁹

2 Mr. Clapper testified that his written memorandum regarding his interview with Ms. Patricola
3 incorrectly identified Ms. Patricola as having made referrals of the Concordia investment to other
4 people and as having spoken to her attorney prior to the interview.⁷⁰⁰ Mr. Clapper testified that this
5 information was in regard to Ms. Fuhrman, not Ms. Particola, whom he also interviewed.⁷⁰¹ Mr.
6 Clapper testified that Ms. Fuhrman said that the investment appealed to her because of its liquidity.⁷⁰²
7 Mr. Clapper testified that Ms. Fuhrman was on the Board of Hospice of Havasu, which invested in
8 Concordia, also having been attracted by the liquidity of the investment.⁷⁰³ Mr. Clapper testified that
9 Ms. Fuhrman said that Mr. Bersch sold the Concordia investment to her and Hospice of Havasu.⁷⁰⁴
10 Mr. Clapper testified that Ms. Fuhrman and Mr. Bersch had a working relationship where they referred
11 people back and forth between their professions and that she had referred “a handful of people or less
12 to Mr. Bersch regarding Concordia.”⁷⁰⁵ Mr. Clapper testified that Ms. Fuhrman told him that she
13 received finder’s fees from Mr. Bersch.⁷⁰⁶

14 Mr. Clapper testified that Sterling McCowan reported to the Division that he was attracted to
15 the Concordia investment because of the safety of principal, higher guaranteed interest rate, liquidity,
16 Concordia’s guarantees to replace non-performing contracts, and the guarantee of 10 or 12% interest.⁷⁰⁷
17 Mr. Clapper testified that Mr. McCowan reported to the Division that Mr. Wanzek was the salesperson
18 for his investment.⁷⁰⁸

19 Mr. Clapper testified that investors Darrell and Kathy Martin were interviewed by the Division
20 and said they were attracted to the investment by the safety of principal, higher guaranteed interest rate,
21 and liquidity.⁷⁰⁹ Mr. Clapper testified that Darrell and Kathy Martin reported to the Division that Mr.
22

23 ⁶⁹⁹ Tr. at 1409-1410.

24 ⁷⁰⁰ Tr. at 1330; Exh. ER-10.

⁷⁰¹ Tr. at 1330, 1408-1409, 1537; Exh. ER-10.

25 ⁷⁰² Tr. at 1340.

⁷⁰³ Tr. at 1340-1341.

26 ⁷⁰⁴ Tr. at 1341.

⁷⁰⁵ Tr. at 1396-1397, 1473.

27 ⁷⁰⁶ Tr. at 1397, 1533.

⁷⁰⁷ Tr. at 1350.

28 ⁷⁰⁸ Tr. at 1350-1351.

⁷⁰⁹ Tr. at 1351.

1 Wanzek was the salesperson for their investment.⁷¹⁰

2 Mr. Clapper testified that the Division contacted investor David Roth who reported he was
3 attracted to the investment by the liquidity and because Mr. Wanzek was the salesperson.⁷¹¹ Mr.
4 Clapper testified that the Division contacted investors Gene and Linda Bronsart who reported they were
5 attracted to the investment by the liquidity and because Mr. Wanzek was their salesperson.⁷¹² Mr.
6 Clapper testified that the Division interviewed investors Gerald and Linda Hoffart who reported they
7 were attracted to the investment by the safety of principal, and liquidity and because Mr. Wanzek was
8 the salesperson.⁷¹³ Mr. Clapper testified that the Division interviewed investor Bryan Peters who
9 reported he was attracted to the Concordia investment because of the safety of principal, higher
10 guaranteed interest rate, liquidity, and the replacement of non-performing contracts.⁷¹⁴

11 Mr. Clapper testified that the course of his investigation spanned the initial assignment of the
12 case in August 2012 through 2016, with Lisa Fuhrman having produced the flowchart.⁷¹⁵ Mr. Clapper
13 testified that he spoke with Greg E. Smith, former President of Sunset Financial, on November 29,
14 2016, about the conflicting sales agreements wherein one appeared to be a draft and the other a final,
15 to inquire whether a selling agreement was ever finalized.⁷¹⁶ Mr. Clapper testified that Mr. Smith said
16 that normally draft copies would not be signed, but he admitted his signature was on the draft.⁷¹⁷ Mr.
17 Clapper testified that Mr. Smith had no recollection of Concordia or ER Financial, but if there had been
18 a Selling Agreement with Concordia, his signature would have appeared on the final copy and he would
19 have initialed in the section for "Waiver of Jury Trial."⁷¹⁸ Mr. Clapper testified that Mr. Smith said
20 that without those signatures he did not believe the selling agreement was ever completed.⁷¹⁹ Mr.
21 Clapper testified that he did not ask Mr. Smith about the documents the Division received from Sunset
22 Financial, nor did Mr. Smith volunteer any information about those documents.⁷²⁰ On cross-

23 ⁷¹⁰ Tr. at 1351-1352.

24 ⁷¹¹ Tr. at 1352.

⁷¹² Tr. at 1352-1353.

25 ⁷¹³ Tr. at 1353.

⁷¹⁴ Tr. at 1354.

26 ⁷¹⁵ Tr. at 1354-1355.

⁷¹⁶ Tr. at 1355-1356, 1359, 1439-1440, 1503-1504, 1506-1507; Exh. ER-12.

27 ⁷¹⁷ Tr. at 1361, 1441; Exh. ER-12.

⁷¹⁸ Tr. at 1361-1362; Exh. ER-12.

28 ⁷¹⁹ Tr. at 1362.

⁷²⁰ Tr. at 1441-1442, 1511-1516, 1518-1520; Exh. ER-15.

1 examination, Mr. Clapper testified that it would be in Mr. Smith's self-interest not to be involved in
 2 this proceeding and that one of the easiest ways to avoid being a part of the proceeding would be to
 3 state that he did not execute a sales agreement.⁷²¹ Mr. Clapper testified that he did not intimate that
 4 Mr. Smith could be brought in as a respondent on this proceeding or that the Division might take an
 5 action against him if he did not cooperate.⁷²² On cross-examination, Mr. Clapper testified that a FINRA
 6 broker check report for Sunset Financial revealed nine regulatory events, which could be violations of
 7 FINRA rules, and could possibly be an incentive to avoid an ongoing proceeding.⁷²³

8 On cross-examination, Mr. Clapper testified that he believed that the third-party insurer
 9 referenced in paragraph 88(c) of the Amended Notice was Kansas City Life.⁷²⁴ Mr. Clapper testified
 10 that flowcharts showed to investors stated that the product was approved by Kansas City Life, but the
 11 flowcharts do not use the words "insured," "underwrote," or "guarantee."⁷²⁵

12 Mr. Clapper testified that Sunset Financial is a securities broker-dealer but the Division did not
 13 conduct an investigation of it in this case because the investments were mostly sold by Mr. Bersch and
 14 Mr. Wanzek through ER Financial.⁷²⁶

15 Mr. Clapper testified that no investor raised a concern with him that ER Financial did not have
 16 an escrow license and that he has had no discussion with the Arizona Department of Financial
 17 Institutions.⁷²⁷

18 Mr. Clapper testified that some of the investors told investigators that they believed they were
 19 treated fairly in the investment and made positive comments regarding Mr. Bersch and Mr. Wanzek.⁷²⁸

20 Mr. Clapper testified that investor Daniel Jauregui had worked for Concordia in data entry.⁷²⁹
 21 Mr. Clapper testified that four investors with the same last name did not want to be contacted by the
 22 Division per their counsel; these investors lived in California where they filed a civil action against
 23

24 ⁷²¹ Tr. at 1507-1508.

25 ⁷²² Tr. at 1552.

26 ⁷²³ Tr. at 1508-1511.

27 ⁷²⁴ Tr. at 1382-1383; Amended Notice at ¶ 88(c).

28 ⁷²⁵ Tr. at 1383-1387; Exhs. S-11f, S-24l, S-110f.

⁷²⁶ Tr. at 1387-1389.

⁷²⁷ Tr. at 1390-1391.

⁷²⁸ Tr. at 1393, 1534-1535.

⁷²⁹ Tr. at 1397-1398.

1 Ken Crowder, Christopher Crowder, and Concordia.⁷³⁰ Mr. Clapper testified that some investors told
 2 the Division's investigators that they were aware that there would be risk in the investment.⁷³¹

3 Mr. Clapper testified that the Division received documents from Sunset Financial on July 15,
 4 2013.⁷³² The documents, as identified in a cover letter by Sunset Financial, include a single sheet
 5 payment arrangement that states "Product Approved by Kansas City Life Ins., Broker: Sunset
 6 Financial" at the bottom.⁷³³ A flowchart in the documents provided by Sunset Financial contains the
 7 same language referenced in the cover letter.⁷³⁴ The cover letter also states that Randolph Albers was
 8 being paid on Concordia secured notes through Sunset Financial and that Mr. Albers indicated in his
 9 filings that the notes had been approved by Sunset Financial, although Sunset Financial showed no
 10 records indicating that to be true.⁷³⁵ Among the documents from Sunset Financial was a registered
 11 representative survey by Randolph Albers that listed Concordia among a list of private securities
 12 transactions and stated that "[s]ale of private placements made to accredited investors only, and only
 13 after approved by Sunset Financial Services."⁷³⁶ A compliance questionnaire further acknowledged
 14 the sale of private investments in Concordia which "have been approved by Sunset."⁷³⁷ Mr. Clapper
 15 testified that the compliance department at Sunset Financial should have had these documents.⁷³⁸

16 Also included in the documents from Sunset Financial were cover letters, dated October 30,
 17 2000, March 1, 2007, and March 13, 2009, to Sunset Financial from Concordia identifying enclosed
 18 payments of commissions, custodial fees, and finder's fees, along with documentation of checks.⁷³⁹
 19 Mr. Clapper testified that whoever received the checks for Sunset Financial should have been familiar
 20 with Concordia.⁷⁴⁰ The documents from Sunset Financial also included email exchanges from 2010
 21 regarding Concordia that included Kim Kirkman, indicating that Mr. Kirkman was aware of Concordia
 22

23 ⁷³⁰ Tr. at 1399, 1533-1534.

24 ⁷³¹ Tr. at 1403-1404, 1535.

25 ⁷³² Tr. at 1424.

26 ⁷³³ Tr. at 1425-1426; Exh. ER-15 at ACC011412.

27 ⁷³⁴ Tr. at 1426-1427, 1562; Exh. ER-15 at ACC011493.

28 ⁷³⁵ Tr. at 1429; Exh. ER-15 at ACC011413.

⁷³⁶ Tr. at 1430-1431, 1515-1516, 1550; Exh. ER-15 at ACC011518, ACC011521-ACC011522.

⁷³⁷ Tr. at 1431-1432, 1563; Exh. ER-15 at ACC011524-ACC011525.

⁷³⁸ Tr. at 1433.

⁷³⁹ Tr. at 1435-1436, 1511-1514, 1516; Exh. ER-15 at ACC011530-ACC011531, ACC011535-ACC011538.

⁷⁴⁰ Tr. at 1436.

1 at that time.⁷⁴¹ An email from Chris Crowder, dated May 13, 2010, said “[a]fter talking with Randy
 2 about options in today’s market, he suggested that we contact you in order to present a viable fund for
 3 Sunset Financial Service’s consideration.”⁷⁴² A subsequent email in that chain written by Mr. Kirkman
 4 regarding Concordia, dated May 17, 2010, stated “[w]hoa, boy, Randy Albers put all kinds of ideas in
 5 his head. SFS is not doing this.”⁷⁴³

6 Mr. Clapper testified that the documents received from Sunset Financial included
 7 correspondence about the creation of a new company, Concordia Funding, which would be a different
 8 entity than Respondent Concordia.⁷⁴⁴ Documents received from Sunset Financial also stated that
 9 Concordia would be the manager of Concordia Funding, that Concordia Funding would be a separate
 10 corporate entity used only to acquire and hold the Conditional Installment Sales Contracts originated
 11 and serviced by Concordia, and that the investment purpose for the sale of units in Concordia Funding
 12 was for Concordia to use the net proceeds to purchase class 8 truck Sales Contracts with investments
 13 to be made in qualified Sales Contracts originated by Concordia.⁷⁴⁵

14 On October 7, 2013, the California Department of Business Oversight issued copies of a Desist
 15 and Refrain Order to Mr. Wanzek and Mr. Bersch.⁷⁴⁶ Mr. Clapper testified that the Desist and Refrain
 16 Order did not include any restitution, fines or administrative penalties.⁷⁴⁷ The October 7, 2013 Desist
 17 and Refrain Orders stated that “Investors were told that Kansas City Life Insurance Company insured
 18 their investments, when in actuality the investments were not insured.”⁷⁴⁸ Pursuant to a Settlement
 19 Agreement with Concordia, Kenneth Crowder and Christopher Crowder, an Amended Desist and
 20 Refrain Order was issued by the California Department of Business Oversight on October 3, 2014,
 21 which omitted the allegation about Kansas City Life from the October 7, 2013 Desist and Refrain
 22 Order.⁷⁴⁹ The Settlement Agreement states that the October 7, 2013 Desist and Refrain Orders remain

23 ⁷⁴¹ Tr. at 1436-1438; Exh. ER-15 at ACC011570-ACC011572.

24 ⁷⁴² Exh. ER-15 at ACC011570.

25 ⁷⁴³ Tr. at 1540-1541; Exh. ER-15 at ACC011570.

26 ⁷⁴⁴ Tr. at 1529-1531; Exh. ER-15 at ACC011546, ACC011551, ACC011555.

27 ⁷⁴⁵ Tr. at 1554-1556, 1566; Exh. ER-15 at ACC011555, ACC011568.

28 ⁷⁴⁶ Tr. at 1244-1245, 1446; Exhs. S-176a, S-176b. By stipulation among the parties, the California Desist and Refrain Order is not considered regarding Concordia.

⁷⁴⁷ Tr. at 1446-1447; Exhs. S-176a, S-176b.

⁷⁴⁸ Tr. at 1449-1450; Exhs. S-176a, S-176b.

⁷⁴⁹ Tr. at 1447-1448, 1450-1451, 1542; Exhs. ER-5, ER-13. By stipulation among the parties, the California Amended Desist and Refrain Order and Settlement Agreement are not considered regarding Concordia.

1 in full effect as to Mr. Wanzek and Mr. Bersch.⁷⁵⁰ Under the October 7, 2013 Desist and Refrain Order,
 2 Mr. Wanzek and Mr. Bersch were found to have offered and sold to investors securities in the form of
 3 investment contracts, i.e., the Servicing Agreements, which were unqualified, non-exempt securities.⁷⁵¹
 4 The October 7, 2013 Desist and Refrain Order further found Mr. Wanzek and Mr. Bersch to have made
 5 material misrepresentations of facts and omitted to state material facts necessary to make statements
 6 made, in the light of the circumstances under which they were made, not misleading.⁷⁵² The October
 7 7, 2013 Desist and Refrain Order asserts that the misrepresentations include telling investors that their
 8 investments had 100% liquidity when in actuality investors attempted and were unable to withdraw
 9 their money.⁷⁵³ Mr. Clapper testified that no hearing was conducted on either the October 7, 2013
 10 Desist and Refrain Order or the Amended Desist and Refrain Order.⁷⁵⁴

11 On cross-examination, Mr. Clapper testified that other than speaking to some of the investors
 12 directly, he did not take further steps to determine the Arizona residency of investors other than
 13 reviewing the addresses on the Servicing Agreements.⁷⁵⁵ Mr. Clapper testified that investors reported
 14 salespersons included Charlie Buttke, Chris and Kenneth Crowder, or no salesperson.⁷⁵⁶

15 On cross-examination, Mr. Clapper testified that the Division did not have copies of
 16 information used by investors at the hearing, including the Quicken account of investor Mr. Luhr or
 17 the documents of Ms. Hodel.⁷⁵⁷ On cross-examination, Mr. Clapper testified that Ms. LeMay testifying
 18 that she is angry and referring to some of the Respondents as “cronies” could be indicia of a
 19 confirmation bias.⁷⁵⁸ On cross-examination, Mr. Clapper testified that he could not recall any investor
 20 who stated that he or she did not receive payments from Concordia anytime from 1999 through 2008.⁷⁵⁹
 21 On cross-examination, Mr. Clapper testified that certain “insider status” investors were excluded from
 22 the restitution sought because of their family relationship with the Respondents.⁷⁶⁰ On cross-

23 ⁷⁵⁰ Tr. at 1542-1543; Exh. ER-13 at 2.

24 ⁷⁵¹ Tr. at 1543-1544; Exhs. S-176a, S-176b.

⁷⁵² Tr. at 1544; Exhs. S-176a, S-176b.

25 ⁷⁵³ Tr. at 1545; Exhs. S-176a, S-176b.

⁷⁵⁴ Tr. at 1559.

26 ⁷⁵⁵ Tr. at 1452-1454.

⁷⁵⁶ Tr. at 1454-1458.

27 ⁷⁵⁷ Tr. at 1489-1490.

⁷⁵⁸ Tr. at 1493.

⁷⁵⁹ Tr. at 1496-1497.

28 ⁷⁶⁰ Tr. at 1497-1498.

1 examination, Mr. Clapper testified that investor Jack Guest told the Division's investigator that he
 2 believed he invested twice, a total of a little over \$50,000, without differentiating a separate trust
 3 account.⁷⁶¹

4 David John Wanzek

5 Mr. Wanzek testified that he is a certified public accountant, licensed in Arizona and Florida.⁷⁶²
 6 Mr. Wanzek testified that he has been an accountant for 33 years and that he was a partner with Mr.
 7 Bersch from 1990 until 2012.⁷⁶³ Mr. Wanzek testified that he has been involved with charitable
 8 organizations and has served on the boards for Kiwanis of Lake Havasu, Haven Center for Abused
 9 Women, and Our Saviour Lutheran Church.⁷⁶⁴ Mr. Wanzek testified that he and his wife, Linda
 10 Wanzek, have been residents of Florida since April 2010.⁷⁶⁵ Mr. Wanzek testified that he lived in Lake
 11 Havasu City, Arizona, from 1990 until 2010.⁷⁶⁶ Mr. Wanzek testified that his wife is basically a stay-
 12 at-home mom who had no involvement in selling Concordia truck loans.⁷⁶⁷ Mr. Wanzek testified that
 13 Ken Crowder is his wife's uncle and that Chris Crowder is her cousin.⁷⁶⁸

14 Mr. Wanzek testified that he first became involved with Concordia after being contacted by
 15 Ken Crowder to ask if he would be interested in investing in April or May 1997.⁷⁶⁹ Mr. Wanzek
 16 testified that he initially said no but later decided to invest in Concordia.⁷⁷⁰ Mr. Wanzek testified that
 17 he asked whether the Concordia investments were securities and he was told they were not by Ken
 18 Crowder and an attorney for Concordia.⁷⁷¹ On cross-examination, Mr. Wanzek testified he did not
 19 know the attorney's area of practice or whether the attorney knew anything about securities.⁷⁷² Mr.
 20 Wanzek testified that he would not have gotten involved with the sale of Concordia investments if he
 21 knew that they were securities and he was told by Concordia that no licenses were required to sell the
 22

23 ⁷⁶¹ Tr. at 1501-1503; Exh. S-194.

24 ⁷⁶² Tr. at 1588.

25 ⁷⁶³ Tr. at 1588.

26 ⁷⁶⁴ Tr. at 1590.

27 ⁷⁶⁵ Tr. at 1588-1589.

28 ⁷⁶⁶ Tr. at 1589.

⁷⁶⁷ Tr. at 1589.

⁷⁶⁸ Tr. at 1590.

⁷⁶⁹ Tr. at 1590-1591.

⁷⁷⁰ Tr. at 1591.

⁷⁷¹ Tr. at 1591, 1703-1704.

⁷⁷² Tr. at 1704-1705.

1 Concordia agreements.⁷⁷³ Mr. Wanzek testified that a number of the investors were accounting clients
 2 of his and Mr. Bersch, and that people generally came to know about the Concordia investments
 3 through word of mouth through the small community.⁷⁷⁴

4 Mr. Wanzek testified that he was on Concordia's Board of Directors from 2000 through 2008,
 5 although he had told Chris or Ken Crowder that he planned to resign in 2005.⁷⁷⁵ Mr. Wanzek testified
 6 that the board was very inactive and that he attended approximately five meetings total.⁷⁷⁶ Mr. Wanzek
 7 testified that, as a board member, he sometimes received financial statements for Concordia.⁷⁷⁷ Mr.
 8 Wanzek testified that when he did not receive financial statements he raised the issue with Kenneth
 9 Crowder and Christopher Crowder, although he did not recall those conversations.⁷⁷⁸ Mr. Wanzek
 10 testified that Ken Crowder was essentially in control of Concordia with Chris Crowder becoming
 11 involved in late 1999 or early 2000 with his role increasing over time.⁷⁷⁹

12 Mr. Wanzek testified that Concordia's agreements were prepared by the company's attorney.⁷⁸⁰
 13 Mr. Wanzek testified that he understood Concordia to buy Conditional Sales Contracts which would
 14 then be assigned to investors, with investors paid from the money coming in on the loans to truckers,
 15 thereby leaving the success of the investment entirely dependent upon whether truckers repaid their
 16 loans.⁷⁸¹ Mr. Wanzek testified that Concordia acted as servicing agent for the truck loans, which were
 17 secured by the truck titles.⁷⁸² Mr. Wanzek testified that ER Financial served as the Custodian for most
 18 of the investors' truck titles and that several of them came in to look at the titles.⁷⁸³ Mr. Wanzek
 19 testified that he told investors that everything has risk and Concordia was no different than any other
 20 investment.⁷⁸⁴ Mr. Wanzek testified that Concordia was responsible for communicating with investors
 21 in 2009, about the First Amendment, and in 2011, about the Second Amendment.⁷⁸⁵

22 ⁷⁷³ Tr. at 1592.

23 ⁷⁷⁴ Tr. at 1592, 1602.

24 ⁷⁷⁵ Tr. at 1592-1593, 1637.

25 ⁷⁷⁶ Tr. at 1593.

26 ⁷⁷⁷ Tr. at 1637-1639.

27 ⁷⁷⁸ Tr. at 1639-1640.

28 ⁷⁷⁹ Tr. at 1593.

⁷⁸⁰ Tr. at 1593.

⁷⁸¹ Tr. at 1594.

⁷⁸² Tr. at 1595.

⁷⁸³ Tr. at 1595-1597.

⁷⁸⁴ Tr. at 1596.

⁷⁸⁵ Tr. at 1596.

1 Mr. Wanzek testified that he and Mr. Bersch formed ER Financial in 2001 to separate it from
 2 their accounting practice.⁷⁸⁶ Mr. Wanzek testified that he and Mr. Bersch were the sole members of
 3 ER Financial, that they had the legal power to control ER Financial, and that they actually controlled
 4 the activities of the company.⁷⁸⁷ Mr. Wanzek testified that he and Mr. Bersch conducted business as
 5 ER Financial and Advisory Services prior to forming ER Financial in 2001.⁷⁸⁸ Mr. Wanzek testified
 6 that ER Financial was created mainly for handling the custodial work and had no other business.⁷⁸⁹
 7 Mr. Wanzek signed fifty-three Custodial Agreements on behalf of ER Financial.⁷⁹⁰ Mr. Wanzek

8
 9 ⁷⁸⁶ Tr. at 1596-1597, 1656.

⁷⁸⁷ Tr. at 1706.

⁷⁸⁸ Tr. at 1657-1658.

⁷⁸⁹ Tr. at 1648-1649.

⁷⁹⁰ Mr. Wanzek testified to having signed 34 Custodial Agreements, and stipulated to having signed another 19:

- 11 1. V. Singleton (10/24/2005). Tr. at 1660; Exhs. S-4d, S-4e.
- 12 2. P. Singleton (10/10/2005). Tr. at 1661; Exhs. S-8a, S-8b.
- 13 3. Pike (5/11/2004). Stipulation to Facts Concerning Certain Securities Division Exhibits at Stipulation No. 5, Dec.
 9, 2016 ("Stipulation No. 5"); Exhs. S-13a, S-13b.
- 14 4. Nichols Trust (1/23/2004). Stipulation No. 5; Exhs. S-20c, S-21a, S-21b.
- 15 5. Caputo (11/10/2005). Stipulation No. 5; Exhs. S-26a, S-26b.
- 16 6. Shufflebotham Trust (7/18/2008). Tr. at 1662; Exhs. S-30a, S-30b.
- 17 7. Peter and Debra Foti (6/30/2008). Tr. at 1662; Exhs. S-36a, S-36b.
- 18 8. Frank Foti (6/30/2008). Tr. at 1662-1663; Exhs. S-38a, S-38b.
- 19 9. Putnam (4/1/2000). Tr. at 1663; Exhs. S-41a, S-41b.
- 20 10. Anderson Charitable Trust (1/14/2003). Stipulation No. 5; Exhs. S-45a, S-45b.
- 21 11. Anderson (6/22/2004). Tr. at 1663; Exhs. S-46a, S-46b.
- 22 12. Mendenhall Trust (3/14/2003). Tr. at 1663-1664; Exhs. S-48a, S-48b.
- 23 13. Mendenhall Trust (7/15/2004). Tr. at 1664; Exhs. S-49a, S-49b.
- 24 14. Bronsart (9/1/2004). Tr. at 1664; Exhs. S-50a, S-50b.
- 25 15. Martin (2/17/2004). Stipulation No. 5; Exhs. S-54a, S-54b.
- 26 16. Roth/Adams (3/6/2004). Stipulation No. 5; Exhs. S-57a, S-57b.
- 27 17. Herman (3/1/2004). Stipulation No. 5; Exhs. S-60a, S-60b.
- 28 18. Culwell (3/15/2004). Tr. at 1664-1665; Exhs. S-61a, S-61b.
- 19 19. Lewis (1/1/2005). Tr. at 1665; Exhs. S-65a, S-65b.
- 20 20. Weiss (1/1/2005). Tr. at 1665; Exhs. S-66a, S-66b.
- 21 21. Ridgway (6/12/2002). Tr. at 1665-1666; Exhs. S-68a, S-68b.
- 22 22. Ridgway (7/6/2003). Stipulation No. 5; Exhs. S-69a, S-69b.
- 23 23. Grover (8/13/2003). Stipulation No. 5; Exhs. S-71a, S-71b.
- 24 24. Schuringa Trust (12/6/1999). Stipulation No. 5; Exhs. S-75a, S-75b.
- 25 25. Ryen (6/13/2002). Tr. at 1666; Exhs. S-77a, S-77b.
- 26 26. Ryen Trust (3/16/2006). Stipulation No. 5; Exhs. S-79a, S-79b.
- 27 27. Ryen Trust (3/16/2006). Tr. at 1666; Exhs. S-80a, S-80b.
- 28 28. Ryen Trust (3/16/2006). Tr. at 1666; Exhs. S-80c, S-80d.
- 29 29. McCowan (11/1/2002). Tr. at 1667; Exhs. S-88a, S-88b.
- 30 30. Roberts/Lange (3/1/2003). Stipulation No. 5; Exhs. S-90a, S-90b.
- 31 31. Nolden Trust (3/26/2003). Tr. at 1667; Exhs. S-91a, S-91b.
- 32 32. Englert (7/5/2006). Stipulation No. 5; Exhs. S-100a, S-100b.
- 33 33. Norton (11/16/2005). Tr. at 1668; Exhs. S-107a, S-107b.
- 34 34. Hatch (12/1/2005). Tr. at 1668-1669; Exhs. S-108a, S-108b.
- 35 35. Peters (12/5/2005). Tr. at 1669; Exhs. S-109a, S-109b.
- 36 36. Morgan Trust (2/1/2006). Tr. at 1680; Exhs. S-114a, S-114d.

1 testified that ER Financial stopped operating in late 2008, when it stopped getting paid, and it was
 2 dissolved in 2012.⁷⁹¹ Mr. Wanzek testified that neither he, nor his accounting firm, nor ER Financial,
 3 ever did payroll for Concordia.⁷⁹² Mr. Wanzek testified that ER Financial did not handle the accounting
 4 for commissions paid by Concordia.⁷⁹³ On cross-examination, Mr. Wanzek could not explain why a
 5 telephone number that he identified as being his daughter's personal cell phone would be stamped on
 6 a letter, from Chris Crowder to Sunset Financial, that accompanied a check for commissions from
 7 investments generated by Randy Albers.⁷⁹⁴ Mr. Wanzek testified that his daughter was an employee
 8 of Mr. Wanzek's accounting office.⁷⁹⁵ Mr. Wanzek testified that ER Financial had expenses in its role
 9 as Custodian and it would pay for the use of staff and facilities from the accounting firm.⁷⁹⁶ Mr.
 10 Wanzek testified that he did not remember ER Financial ever resigning as Custodian.⁷⁹⁷ Mr. Wanzek
 11 testified that ER Financial stopped acting as Custodian for investors after the Second Amendment,
 12 through 2010 when Concordia needed the titles back to change an address.⁷⁹⁸ Mr. Wanzek testified
 13 that ER Financial maintained a file for each investor it provided Custodian services for, but these files
 14 were returned to Concordia in November 2010.⁷⁹⁹ ER Financial received \$2.5 million in custodial fees

16 37. Morgan Trust (2/1/2006). Tr. at 1680-1681; Exhs. S-114b, S-114e.

17 38. Weaver Trust (8/4/2000). Tr. at 1681; Exhs. S-117a, S-117b.

18 39. Wilson (2/9/2000). Tr. at 1681; Exhs. S-118a, S-118b.

19 40. Lichtenberg (3/29/2000). Tr. at 1681; Exhs. S-120a, S-120b.

20 41. Rudofsky (11/5/2001). Tr. at 1681-1682; Exhs. S-125a, S-125b.

21 42. Poole (11/14/2001). Tr. at 1682; Exhs. S-127a, S-127b.

22 43. Thompson Trust (4/9/2001). Stipulation No. 5; Exhs. S-128a, S-128b.

23 44. Buttke (5/21/1999). Tr. at 1682; Exhs. S-132a, S-132b.

24 45. McClaran/Bilbao (4/9/2001). Stipulation No. 5; Exhs. S-136a, S-136b.

25 46. Schuringa (2/18/1998). Stipulation No. 5; Exhs. S-137a, S-137b.

26 47. Ridgway-Ford Trust (12/1/1998). Tr. at 1682-1683; Exhs. S-140a, S-140b.

27 48. Neathery Trust (12/1/2005). Tr. at 1684; Exhs. S-150c, S-150d.

28 49. Hoffort (12/8/2004). Tr. at 1684-1685; Exhs. S-152a, S-152b.

50. Barlow/Chau (9/24/1998). Tr. at 1685; Exhs. S-153a, S-153b.

51. John Gilje Inc. (12/8/1999). Stipulation No. 5; Exhs. S-157a, S-157b.

52. John Gilje Inc. (3/1/2000). Stipulation No. 5; Exhs. S-158a, S-158b.

53. John Gilje Inc. (10/5/2001). Stipulation No. 5; Exhs. S-159a, S-159b.

⁷⁹¹ Tr. at 1597, 1649.

⁷⁹² Tr. at 1597-1598, 1637.

⁷⁹³ Tr. at 1637.

⁷⁹⁴ Tr. at 1637.

⁷⁹⁵ Tr. at 1732-1733, 1735.

⁷⁹⁶ Tr. at 1598.

⁷⁹⁷ Tr. at 1645.

⁷⁹⁸ Tr. at 1649-1650.

⁷⁹⁹ Tr. at 1598-1599; Exh. S-161.

1 from 2004 through 2008.⁸⁰⁰ Mr. Wanzek testified that ER Financial continued to perform custodial
 2 work after it stopped being paid in 2008, and did so after the First Amendment in 2009.⁸⁰¹ Mr. Wanzek
 3 testified that over time, documents relating to Concordia have been lost, his recollection of
 4 conversations with investors has faded, and approximately ten to twelve investors have died.⁸⁰²

5 Mr. Wanzek testified that he did not register the Concordia investment as a security with the
 6 Commission because he did not think it was a security.⁸⁰³ Mr. Wanzek testified that he believed the
 7 Concordia investments were legitimate and properly done because several professionals did not raise
 8 the question that these were securities: Concordia had attorneys from 1998 through 2008; Concordia
 9 had audited financial statements prepared several years from independent CPA firms; Chino
 10 Commercial Bank was involved as Concordia's banker and as a Custodian; Pacific Financial Advisors
 11 served as financial advisors to Concordia; Sunset Financial, a subsidiary of Kansas City Life, was
 12 selling Concordia agreements.⁸⁰⁴ On cross-examination, Mr. Wanzek testified that he knew one of the
 13 accounting firms used by Concordia had expertise in determining which investments are securities.⁸⁰⁵
 14 Mr. Wanzek testified that neither he nor ER Financial consulted an attorney as to whether the Servicing
 15 Agreements constituted securities under Arizona or federal law.⁸⁰⁶ Mr. Wanzek testified that he did
 16 not take steps to ensure ER Financial was complying with securities law because he did not think the
 17 Concordia investments were securities.⁸⁰⁷

18 Mr. Wanzek testified that he did not respond to the California October 7, 2013 Desist and
 19 Refrain Order because: there was no financial penalty associated with it, he did not believe he was
 20 required to report it to the Arizona Board of Accountancy, it would have been expensive to fight the
 21 order in California proceedings, he was concerned about a future proceeding in Arizona with more
 22 serious charges, and he had stopped selling investments with no plans to sell more in the future.⁸⁰⁸

23 Mr. Wanzek testified that he still does taxes for approximately 30 to 35 of the Concordia

24 ⁸⁰⁰ Tr. at 1720; Exh. S-169.

25 ⁸⁰¹ Tr. at 1738; Exh. S-169.

26 ⁸⁰² Tr. at 1600-1601.

27 ⁸⁰³ Tr. at 1602, 1629.

28 ⁸⁰⁴ Tr. at 1602-1606; Exh. ER-2.

⁸⁰⁵ Tr. at 1705-1706.

⁸⁰⁶ Tr. at 1706-1707.

⁸⁰⁷ Tr. at 1707-1708.

⁸⁰⁸ Tr. at 1606-1609.

1 investors.⁸⁰⁹

2 Mr. Wanzek testified that he and his wife invested approximately \$550,000 in Concordia
3 agreements.⁸¹⁰ Mr. Wanzek testified that other family members also invested in Concordia: his wife's
4 parents invested \$677,000, his parents invested \$2,450,000, and his brother invested \$150,000.⁸¹¹ Mr.
5 Wanzek testified that he did the custodial work on the investments of his family members and that the
6 custodial fees were paid to his wife.⁸¹² Mr. Wanzek testified that his wife's father was a Superior Court
7 judge in California who never said that the investment was a security.⁸¹³ Mr. Wanzek testified that he
8 and his family members have suffered losses in Concordia like other investors, although he and his
9 brother came close to breaking even on the investment.⁸¹⁴ Mr. Wanzek testified that none of the
10 investing family members support the administrative charges against him or want restitution in
11 connection with this case.⁸¹⁵

12 Mr. Wanzek testified to having received handouts and PowerPoint presentations from
13 Concordia and Ken Crowder.⁸¹⁶ Mr. Wanzek testified that he had Concordia handouts in his office to
14 give to persons who asked about Concordia.⁸¹⁷ On cross-examination, Mr. Wanzek testified that he
15 disagreed with testimony given by Ken Crowder at an examination under oath where Mr. Crowder
16 stated that Concordia did not create flow charts and a handout regarding the investment but that ER
17 Financial had created similar documents that were used by Mr. Bersch and/or Mr. Wanzek.⁸¹⁸ One of
18 the flow chart documents stated that the product was approved by Kansas City Life.⁸¹⁹ Mr. Wanzek
19 testified that he signed a selling agreement, labeled a draft, with Concordia and Sunset Financial.⁸²⁰
20 Mr. Wanzek testified that Sunset Financial conducted a due diligence review of Concordia before
21 signing the selling agreement.⁸²¹ Mr. Wanzek testified that Sunset Financial sold Concordia

22 ⁸⁰⁹ Tr. at 1609.

23 ⁸¹⁰ Tr. at 1609-1610, 1722.

24 ⁸¹¹ Tr. at 1610, 1722-1723.

25 ⁸¹² Tr. at 1725.

26 ⁸¹³ Tr. at 1610.

27 ⁸¹⁴ Tr. at 1628-1629, 1727.

28 ⁸¹⁵ Tr. at 1611.

⁸¹⁶ Tr. at 1611-1615, 1687-1688, 1727-1728; Exhs. S-13h, S-24l, S-110e, S-110f, S-110h, S-193.

⁸¹⁷ Tr. at 1727-1728; Exh. S-110e.

⁸¹⁸ Tr. at 1688-1692; Exh. S-163 at ACC012127-012129, ACC012242-ACC012254.

⁸¹⁹ Tr. at 1617; Exh. S-110f.

⁸²⁰ Tr. at 1617-1618, 1709; Exh. ER-12.

⁸²¹ Tr. at 1618.

1 investments after signing the agreements and that ER Financial acted as Custodian for the truck loans
 2 sold by Sunset Financial.⁸²² Mr. Wanzek testified that in 2001 or 2002, Randy Albers flew Mr. Wanzek
 3 and Mr. Bersch to a meeting at Kansas City Life's office where they discussed Concordia with
 4 approximately eight to ten Kansas City Life representatives.⁸²³

5 Mr. Wanzek testified that Ken Crowder had referred to ER Financial as Concordia's investor
 6 relations office, but Mr. Wanzek testified that he did not recall using that term, although it may have
 7 been on promotional documents.⁸²⁴

8 Mr. Wanzek testified that prior to 2008, investors in Concordia were able to get their money
 9 out, up to one hundred percent of their investment if they so requested.⁸²⁵ Mr. Wanzek testified that
 10 he did not know whether he told any investors or potential investors, prior to making an investment,
 11 that an investment in Concordia would be liquid.⁸²⁶ Mr. Wanzek testified that Concordia did not always
 12 accept new investments and there were times when investors were turned away because the company
 13 did not need the money.⁸²⁷ Mr. Wanzek testified that Paul Singleton was particularly persistent in
 14 contacting to see if the Concordia investment was open.⁸²⁸

15 Mr. Wanzek testified that ER Financial received finder's fees related to the Concordia
 16 investment that were paid by Concordia, not the investors, and that he disclosed the finder's fees if
 17 people asked about them, although not in writing, and he did not disclose the fees if he was not asked.⁸²⁹
 18 Mr. Wanzek testified that he understood Concordia paid finder's fees to ER Financial not for referring
 19 investors but for handling paperwork, namely "[t]he assistance of the meeting with the investor with
 20 Ken Crowder" or the preparation of the Servicing Agreements and Custodial Agreements, and ER
 21 Financial received finder's fees even when it did not bring in the investment.⁸³⁰ From 2004 through
 22 August 14, 2008, ER Financial received \$565,485 in finder's fees from Concordia.⁸³¹ Mr. Wanzek

23
 24 ⁸²² Tr. at 1618-1619.

25 ⁸²³ Tr. at 1619-1620.

26 ⁸²⁴ Tr. at 1615-1616.

27 ⁸²⁵ Tr. at 1616.

28 ⁸²⁶ Tr. at 1659.

⁸²⁷ Tr. at 1616-1617, 1630-1631.

⁸²⁸ Tr. at 1631.

⁸²⁹ Tr. at 1620, 1635, 1649, 1731.

⁸³⁰ Tr. at 1634-1635, 1718, 1728-1731, 1735; Exh. S-169.

⁸³¹ Tr. at 1719; Exh. S-169.

1 testified that he prepared Servicing Agreements and Custodial Agreements for “some” people.⁸³² Mr.
 2 Wanzek testified that he would take the check, the signed Servicing Agreement, and the signed
 3 Custodial Agreement from the investor, then sign himself, if necessary, and send it to Concordia.⁸³³
 4 Mr. Wanzek testified that ER Financial also received custodial fees for handling the Conditional Sales
 5 Contract.⁸³⁴ Mr. Wanzek testified that prior to 2003, Ken Crowder would meet with the investors prior
 6 to investing.⁸³⁵

7 Mr. Wanzek testified that prior to reading the Amended Notice, he had never heard of the
 8 escrow licensing requirements of the Arizona Department of Financial Institutions, none of the
 9 investors ever asked about escrow licensing, and he was never advised that ER Financial needed an
 10 escrow license by Concordia’s lawyers, accountants, or financial advisors, by Chino Commercial Bank,
 11 by Sunset Financial, or by Kansas City Life.⁸³⁶

12 Mr. Wanzek testified that any investors who had losses could take a deduction on their taxes.⁸³⁷
 13 Mr. Wanzek testified that some of the investors for whom he does taxes have claimed this deduction.⁸³⁸

14 Mr. Wanzek testified that his total assets are \$1,053,568 and his total liabilities are
 15 \$1,076,330.⁸³⁹ Mr. Wanzek testified that the only asset of his marital community is a house in Arizona
 16 worth approximately \$500,000, with liabilities on the house of \$736,000.⁸⁴⁰ Mr. Wanzek testified that
 17 his wife has sole and separate assets in Florida, which is not a community property state.⁸⁴¹ Mr.
 18 Wanzek testified that he could not pay over \$8 million in penalties, fines and restitution if ordered.⁸⁴²
 19 Mr. Wanzek testified that this case has caused stress and health issues for him and his wife.⁸⁴³

20 Mr. Wanzek testified that he believed investors Kristine B. and Gregory Farmer were relatives
 21 of Michael Bersch.⁸⁴⁴

22 ⁸³² Tr. at 1641.

23 ⁸³³ Tr. at 1655-1656.

24 ⁸³⁴ Tr. at 1634-1635.

25 ⁸³⁵ Tr. at 1718-1719.

26 ⁸³⁶ Tr. at 1620-1622.

27 ⁸³⁷ Tr. at 1622.

28 ⁸³⁸ Tr. at 1622-1623.

⁸³⁹ Tr. at 1623-1625.

⁸⁴⁰ Tr. at 1625-1626.

⁸⁴¹ Tr. at 1626.

⁸⁴² Tr. at 1626.

⁸⁴³ Tr. at 1627-1628.

⁸⁴⁴ Tr. at 1632-1633; Exh. S-194.

1 Mr. Wanzek testified that the Servicing Agreement provided scenarios, in Sections 4.1, 4.2, and
 2 4.3, allowing the release of the Servicing Agreement and vehicle titles.⁸⁴⁵ Mr. Wanzek testified that
 3 absent one of those listed scenarios, ER Financial would not have been authorized to release the
 4 Servicing Agreements and vehicle titles.⁸⁴⁶ Mr. Wanzek testified that Section 4.3 of the Servicing
 5 Agreement remained in full force and effect after both the First Amendment and the Second
 6 Amendment.⁸⁴⁷ Mr. Wanzek testified that “there were times” when ER Financial received written
 7 instructions signed by both Concordia and an investor providing for the disposition of the contracts and
 8 vehicle titles.⁸⁴⁸ Mr. Wanzek testified that under Section 2 of the Second Amendment, Custodian
 9 meant ER Financial or Concordia at the election of the investor, with Concordia being the Custodian
 10 if the investor failed to make an election.⁸⁴⁹

11 Mr. Wanzek testified that under the terms of the Custodial Agreement, absent a default by
 12 Concordia, the Custodian was to continue holding the Conditional Sales Contracts and vehicle titles
 13 unless the Custodian received written authorization from both Concordia and the investor, or the
 14 underlying sales contracts had been paid in full.⁸⁵⁰ Mr. Wanzek testified that the Servicing Agreements
 15 were kept by Concordia.⁸⁵¹ Mr. Wanzek testified that the truck titles and Conditional Sales Contracts
 16 were the collateral for the investors.⁸⁵² Mr. Wanzek testified that in the normal course of business,
 17 titles and Conditional Sales Contracts would go back and forth between Concordia and ER Financial
 18 as contracts would be paid off, sales would be made, or insurance settlements made and those contracts
 19 and titles would need to be replaced.⁸⁵³ Mr. Wanzek testified that investors were made aware of this
 20 process of titles and Conditional Sales Contracts going back and forth between Concordia and ER
 21 Financial.⁸⁵⁴

22 Mr. Wanzek testified that in 2010, Concordia instructed that the titles be returned to change
 23

24 ⁸⁴⁵ Tr. at 1643-1645; *See, e.g.*, Exh. S-12a at §§ 4.1, 4.2, and 4.3.

⁸⁴⁶ Tr. at 1645.

⁸⁴⁷ Tr. at 1701-1703.

⁸⁴⁸ Tr. at 1645-1646.

⁸⁴⁹ Tr. at 1738-1739; Exh. S-12d.

⁸⁵⁰ Tr. at 1647, 1729.

⁸⁵¹ Tr. at 1693-1694.

⁸⁵² Tr. at 1696.

⁸⁵³ Tr. at 1735-1736.

⁸⁵⁴ Tr. at 1735-1736.

1 addresses on them, and titles along with other paperwork, which may have included contracts, notes
 2 and records, were shipped to Concordia, which had stated it would return the documents after changing
 3 the addresses.⁸⁵⁵ Mr. Wanzek testified that ER Financial never received the collateral back from
 4 Concordia and that the investors' collateral was essentially gone after it was sent to Concordia.⁸⁵⁶ On
 5 recross examination, Mr. Wanzek testified that the collateral was the trucks themselves, which did not
 6 disappear when paperwork was sent back to Concordia.⁸⁵⁷ Mr. Wanzek testified that ER Financial
 7 only sent back to Concordia the vehicle titles that clients had given authorization for them to send.⁸⁵⁸
 8 Mr. Wanzek testified that he received verbal authorization from Ms. Patricola to release the documents
 9 when she came in to review her titles in 2007 or 2008.⁸⁵⁹ On further questioning, Mr. Wanzek testified
 10 that in November 2010 he had no written authorization from any investors to send the vehicle titles
 11 back to Concordia.⁸⁶⁰ Mr. Wanzek testified that he never provided written notice to the investors that
 12 ER Financial was ceasing to act as Custodian.⁸⁶¹

13 Mr. Wanzek testified that he could not remember whether he told any investors that he was
 14 monitoring Concordia's financial positions.⁸⁶² An undated letter from Mr. Wanzek and Mr. Bersch to
 15 investors said that "As in the past, we also will monitor the financial position of Concordia."⁸⁶³

16 Mr. Wanzek testified that he has never applied to be licensed as an escrow agent by the Arizona
 17 Department of Financial Institutions.⁸⁶⁴ Mr. Wanzek testified that to his knowledge, Mr. Bersch has
 18 never applied to be licensed as an escrow agent, and ER Financial has never applied to be licensed as
 19 an escrow business, by the Arizona Department of Financial Institutions.⁸⁶⁵

20 Mr. Wanzek testified that he received the October 7, 2013 Desist and Refrain Order from the
 21 State of California.⁸⁶⁶ Mr. Wanzek testified that he made a conscious decision not to respond to the
 22

23 ⁸⁵⁵ Tr. at 1650-1651; Exh. S-161.

24 ⁸⁵⁶ Tr. at 1696-1697.

25 ⁸⁵⁷ Tr. at 1741.

26 ⁸⁵⁸ Tr. at 1652.

27 ⁸⁵⁹ Tr. at 1652-1653.

28 ⁸⁶⁰ Tr. at 1654.

⁸⁶¹ Tr. at 1654.

⁸⁶² Tr. at 1697.

⁸⁶³ Tr. at 1698; Exh. S-2f.

⁸⁶⁴ Tr. at 1703.

⁸⁶⁵ Tr. at 1703.

⁸⁶⁶ Tr. at 1714; Exh. S-176a.

1 October 7, 2013 Desist and Refrain Order after consulting counsel.⁸⁶⁷ Mr. Wanzek testified that he
 2 would not have been able to afford California attorney's fees in addition to paying for the case in
 3 Arizona.⁸⁶⁸

4 Mr. Wanzek testified that Lisa Fuhrman signed a Custodial Agreement, as president of Hospice
 5 of Havasu, with Concordia and ER Financial.⁸⁶⁹ Mr. Wanzek testified that he did not know Lisa
 6 Fuhrman prior to her dropping off Servicing Agreements and Custodial Agreements at Mr. Wanzek's
 7 office, which led him to believe she was pitching the agreements.⁸⁷⁰

8 Dr. Kelli Ward

9 Dr. Kelli Ward testified that she is a family physician and former state senator who has lived in
 10 the Lake Havasu City, Arizona, area for seventeen years.⁸⁷¹ Dr. Ward testified that she has known Mr.
 11 Wanzek for close to seventeen years, and that he is her accountant.⁸⁷² Dr. Ward testified that her
 12 opinion of Mr. Wanzek's character is that he is "a fine, upstanding man, very committed to his family,
 13 to his community, to his business," and that he is "above reproach."⁸⁷³ Dr. Ward testified that Mr.
 14 Wanzek has been involved in civic organizations and that she had been pleased with his work as her
 15 accountant.⁸⁷⁴ Dr. Ward testified that she believed Mr. Wanzek was well-respected in the community
 16 in Lake Havasu City.⁸⁷⁵ Dr. Ward testified that she did not invest in Concordia, that she had no
 17 knowledge of how the Concordia investment was marketed or sold, and that she had no knowledge of
 18 how the Concordia investment was to work.⁸⁷⁶

19 Michael Bersch

20 Mr. Bersch testified that he has been a certified public accountant for at least forty years,
 21 licensed in Arizona and Missouri, and that he has been a resident of Lake Havasu City, Arizona, since
 22 1985.⁸⁷⁷ Mr. Bersch testified that he was partners with Mr. Wanzek from 1990 until 2004, when Mr.

23 ⁸⁶⁷ Tr. at 1717.

24 ⁸⁶⁸ Tr. at 1740.

25 ⁸⁶⁹ Tr. at 1742-1743; Exh. S-111b.

26 ⁸⁷⁰ Tr. at 1744.

27 ⁸⁷¹ Tr. at 1673.

28 ⁸⁷² Tr. at 1673-1674.

⁸⁷³ Tr. at 1674-1675.

⁸⁷⁴ Tr. at 1675.

⁸⁷⁵ Tr. at 1676.

⁸⁷⁶ Tr. at 1677.

⁸⁷⁷ Tr. at 1747-1748.

1 Bersch left the firm to take some time off.⁸⁷⁸ Mr. Bersch testified that he has been involved with
 2 numerous charities including Havasu for Youth, Kiwanis, AIDS Walk in Wisconsin, and the Humane
 3 Society, and he has served on the boards for Hospice of Havasu and Mohave Community College.⁸⁷⁹
 4 Mr. Bersch testified that he attended an examination under oath on December 18, 2012, where he took
 5 the Fifth Amendment because he would rather tell his story at hearing.⁸⁸⁰

6 Mr. Bersch testified that he first became involved in Concordia when Ken Crowder came to
 7 visit Mr. Bersch's office in 1997 and asked if Mr. Bersch would be interested in making investments
 8 with him.⁸⁸¹ Mr. Bersch testified that he asked Ken Crowder if all the necessary licenses and permits
 9 had been done properly to allow for Mr. Bersch's involvement and that Mr. Crowder said they were.⁸⁸²
 10 Mr. Bersch testified that he vaguely remembered a phone call with Ken Crowder and Concordia's
 11 attorney in 1997 or 1998.⁸⁸³ Mr. Bersch testified that he would not have gotten involved with
 12 Concordia investments if he knew they were securities.⁸⁸⁴ Mr. Bersch testified that people generally
 13 came to know about the Concordia investments through word of mouth and that the investment was
 14 known to a number of persons in the Lake Havasu City area.⁸⁸⁵

15 Mr. Bersch testified that he was on the Board of Directors of Concordia from approximately
 16 2000 through his resignation in 2005.⁸⁸⁶ Mr. Bersch testified that the board was very inactive and that
 17 he attended maybe one meeting a year.⁸⁸⁷ Mr. Bersch testified that he could not recall whether he
 18 received any of Concordia's financial statements as a member of the Board of Directors.⁸⁸⁸ Mr. Bersch
 19 testified that Ken Crowder was in control of Concordia and that he was not sure when Chris Crowder
 20 became involved.⁸⁸⁹

21 Mr. Bersch testified that he understood the Concordia Servicing Agreement form to have been
 22

23 ⁸⁷⁸ Tr. at 1748.

24 ⁸⁷⁹ Tr. at 1748-1749.

25 ⁸⁸⁰ Tr. at 1749.

26 ⁸⁸¹ Tr. at 1750.

27 ⁸⁸² Tr. at 1750.

28 ⁸⁸³ Tr. at 1750-1751.

⁸⁸⁴ Tr. at 1751, 1763.

⁸⁸⁵ Tr. at 1751, 1754.

⁸⁸⁶ Tr. at 1751, 1903.

⁸⁸⁷ Tr. at 1751.

⁸⁸⁸ Tr. at 1903-1904.

⁸⁸⁹ Tr. at 1751-1752.

1 drafted by Concordia or Concordia's attorneys.⁸⁹⁰ Mr. Bersch testified that Concordia provided him
 2 and Mr. Wanzek with blank copies of the Servicing Agreement and the Custodial Agreement for them
 3 to complete with investors.⁸⁹¹ Mr. Bersch testified that he understood Concordia to put together a
 4 group of truck titles or contracts that were purchased by individuals through the Servicing Agreement
 5 with Concordia acting as the servicing agent and Mr. Bersch and Mr. Wanzek holding the titles and
 6 Conditional Sales Contracts as collateral.⁸⁹² Mr. Bersch testified that Concordia made its money from
 7 the interest charged to truckers and that the money the investors received came from the truckers paying
 8 off their loans, which the investors understood.⁸⁹³ Mr. Bersch testified that the truck loans were secured
 9 by the truck titles and Conditional Sales Contracts.⁸⁹⁴ Mr. Bersch testified that he told investors that
 10 Concordia investments were somewhat risky based upon the truckers paying the loans.⁸⁹⁵ Mr. Bersch
 11 testified that up until 2008, investors were happy with Concordia and some brought in more money to
 12 invest.⁸⁹⁶

13 Mr. Bersch testified that a lot of email communications he had with Concordia and investors
 14 are no longer available to him as they date back fifteen years and "probably four or five computers
 15 ago."⁸⁹⁷

16 Mr. Bersch testified that he had been friends with Kathy Hodel for many years, that they served
 17 together on the Mohave Community College Foundation Board, and that she was a tax client of his.⁸⁹⁸

18 Mr. Bersch testified that he was on the Hospice of Havasu board with Lisa Fuhrman.⁸⁹⁹ Mr.
 19 Bersch testified that Lisa Fuhrman introduced some investors to Concordia and that he paid her a
 20 finder's fee from money he received from ER Financial.⁹⁰⁰

21 Mr. Bersch testified that Suellen LeMay was a client of Buttker, Bersch, and Wanzek.⁹⁰¹ Mr.
 22

23 ⁸⁹⁰ Tr. at 1752.

24 ⁸⁹¹ Tr. at 1908-1909.

25 ⁸⁹² Tr. at 1752.

26 ⁸⁹³ Tr. at 1752-1753.

27 ⁸⁹⁴ Tr. at 1753.

28 ⁸⁹⁵ Tr. at 1753.

⁸⁹⁶ Tr. at 1753.

⁸⁹⁷ Tr. at 1753-1754.

⁸⁹⁸ Tr. at 1755-1756.

⁸⁹⁹ Tr. at 1756.

⁹⁰⁰ Tr. at 1756.

⁹⁰¹ Tr. at 1757.

1 Bersch testified that he believed Ms. LeMay referred her uncle, Mr. Singleton, to become an investor
2 in Concordia.⁹⁰²

3 Mr. Bersch testified that he personally invested in Concordia, as did his sister and brother-in-
4 law, Greg and Chris Farmer.⁹⁰³ Mr. Bersch testified that Greg and Chris Farmer do not support the
5 allegations against him and that they do not want restitution from him.⁹⁰⁴

6 Mr. Bersch testified that Concordia knew that ER Financial may have been using the term
7 “investor relations office” because Ken Crowder called them that.⁹⁰⁵ Mr. Bersch testified that no one
8 at Concordia ever told him not to use the term “investor relations office.”⁹⁰⁶

9 Mr. Bersch testified that prior to 2008, investors who wanted their money back could get it back
10 in its entirety when they wanted.⁹⁰⁷ Mr. Bersch testified that he disclosed the finder’s fee if people
11 asked about it, but he could not recall if he disclosed the fee to any investors who did not ask.⁹⁰⁸ Mr.
12 Bersch testified that he believed Mr. Buttke received some finder’s fees and custodial fees.⁹⁰⁹

13 Mr. Bersch testified that he has a net worth of approximately \$75-80,000 and that he would be
14 unable to pay penalties, fines and restitution in excess of \$8 million, if ordered.⁹¹⁰ Mr. Bersch testified
15 that this case has negatively affected him financially, emotionally, and health wise.⁹¹¹

16 Mr. Bersch testified that the Servicing Agreements and Custodial Agreements were presented
17 to investors to sign “a lot of times” by Ken Crowder, sometimes by Mr. Bersch or Mr. Wanzek, and at
18 least three times by Sunset Financial.⁹¹² Mr. Bersch signed sixty-three Custodial Agreements on behalf
19 of ER Financial.⁹¹³ Another sixteen Custodial Agreements were signed by an unidentified person on

20 _____
⁹⁰² Tr. at 1757.

21 ⁹⁰³ Tr. at 1757-1758.

22 ⁹⁰⁴ Tr. at 1758.

23 ⁹⁰⁵ Tr. at 1758.

24 ⁹⁰⁶ Tr. at 1758.

25 ⁹⁰⁷ Tr. at 1758-1759.

26 ⁹⁰⁸ Tr. at 1759, 1904-1905.

27 ⁹⁰⁹ Tr. at 1759.

28 ⁹¹⁰ Tr. at 1760-1761.

⁹¹¹ Tr. at 1762.

⁹¹² Tr. at 1909.

⁹¹³ Mr. Bersch stipulated to having signed 63 Custodial Agreements:

1. LeMay (4/30/2002). Stipulation to Facts Concerning Certain Securities Division Exhibits at Stipulation No. 4, Dec. 9, 2016 (“Stipulation No. 4”); Exhs. S-2a, S-2b.
2. Luhr (5/11/2004). Stipulation No. 4; Exhs. S-11a, S-11b.
3. Dennison (3/30/2000). Stipulation No. 4; Exhs. S-17a, S-17b.
4. Patricola (4/1/2008). Stipulation No. 4; Exhs. S-18a, S-18b.

5. McCullough Trust (8/28/2002). Stipulation No. 4; Exhs. S-22a, S-22b.
6. Hodel (10/6/1999). Stipulation No. 4; Exhs. S-24a, S-24b.
7. Hodel (10/19/2001). Stipulation No. 4; Exhs. S-24c, S-24d.
8. Hodel (2/13/2004). Stipulation No. 4; Exhs. S-25g, S-25h.
9. Hodel (1/10/2005). Stipulation No. 4; Exhs. S-25i, S-25j.
10. Stephens (9/17/2003). Stipulation No. 4; Exhs. S-29a, S-29b.
11. Wagner (4/15/2008). Stipulation No. 4; Exhs. S-32a, S-32b.
12. CJE Living Trust (5/30/2008). Stipulation No. 4; Exhs. S-34a, S-34b.
13. Edmonds (12/15/2004). Stipulation No. 4; Exhs. S-35a, S-35b.
14. Bric Retirement Trust (6/15/2008). Stipulation No. 4; Exhs. S-40a, S-40b.
15. Putnam (4/9/2004). Stipulation No. 4; Exhs. S-42a, S-42b.
16. Susan Collins (4/20/2004). Stipulation No. 4; Exhs. S-43a, S-43b.
17. Ronald Collins (5/15/2001). Stipulation No. 4; Exhs. S-44a, S-44b.
18. Anderson Family Trust (6/7/2002). Stipulation No. 4; Exhs. S-47a, S-47b.
19. Mills Trust (2/9/2004). Stipulation No. 4; Exhs. S-52a, S-52b.
20. Galst/Black (2/5/2001). Stipulation No. 4; Exhs. S-55a, S-55b.
21. Galst/Black (2/20/2004). Stipulation No. 4; Exhs. S-56a, S-56b.
22. Marriott (3/22/2004). Stipulation No. 4; Exhs. S-58a, S-58b.
23. Lorscheider (4/12/2004). Stipulation No. 4; Exhs. S-62a, S-62b.
24. Lawton Trust (4/15/2004). Stipulation No. 4; Exhs. S-63a, S-63b.
25. Lewis Trust and Weiss Trust (4/7/2004). Stipulation No. 4; Exhs. S-64a, S-64b.
26. Campbell Trust (9/10/2003). Stipulation No. 4; Exhs. S-76a, S-76b.
27. Ryen (10/23/2003). Stipulation No. 4; Exhs. S-78a, S-78b.
28. Fosseen (5/22/2002). Stipulation No. 4; Exhs. S-81a, S-81b.
29. Fosseen (10/20/2003). Stipulation No. 4; Exhs. S-82a, S-82b.
30. Benson (9/17/2002). Stipulation No. 4; Exhs. S-86a, S-86b.
31. Santy (8/20/2002). Stipulation No. 4; Exhs. S-87a, S-87b.
32. DeJulio (11/18/2002). Stipulation No. 4; Exhs. S-89a, S-89b.
33. Joseph Trust (5/29/2002). Stipulation No. 4; Exhs. S-93a, S-93b.
34. Pellarita FBO Desanto (5/23/2001). Stipulation No. 4; Exhs. S-94a, S-94b.
35. Robinson (6/19/2002). Stipulation No. 4; Exhs. S-96a, S-96b.
36. Aldridge Trust (4/5/2006). Stipulation No. 4; Exhs. S-98a, S-98b.
37. Bachmann (7/31/2006). Stipulation No. 4; Exhs. S-101a, S-101b.
38. Reynolds (9/3/2006). Stipulation No. 4; Exhs. S-102a, S-102c.
39. Guest Trust (12/18/2000). Stipulation No. 4; Exhs. S-104a, S-104b.
40. Piles/Fuhrman (11/25/2005). Stipulation No. 4; Exhs. S-110a, S-110b.
41. Ferris-Spence (3/7/2001). Stipulation No. 4; Exhs. S-115b, S-115c.
42. Holmes (4/23/1999). Stipulation No. 4; Exhs. S-119a, S-119b.
43. Neathery Trust (8/1/2001). Stipulation No. 4; Exhs. S-121a, S-121b.
44. Bachmann-Neathery (7/20/2001). Stipulation No. 4; Exhs. S-122a, S-122b.
45. Pellerito (1/4/2001). Stipulation No. 4; Exhs. S-123a, S-123b.
46. Sicuranzo (3/15/2001). Stipulation No. 4; Exhs. S-124a, S-124b.
47. Pryor (6/1/2001). Stipulation No. 4; Exhs. S-126a, S-126b.
48. Charno Trust (12/26/2001). Stipulation No. 4; Exhs. S-129a, S-129b.
49. Chauhan / Powar (11/7/2001). Stipulation No. 4; Exhs. S-130a, S-130b.
50. Gleason Trust (3/12/2002). Stipulation No. 4; Exhs. S-131a, S-131b.
51. Foutz Trust (10/1/2000). Stipulation No. 4; Exhs. S-133a, S-133b.
52. Gardner Trust (8/1/2001). Stipulation No. 4; Exhs. S-134a, S-134b.
53. Hatfield (8/29/2000). Stipulation No. 4; Exhs. S-135a, S-135b.
54. Canterbury (9/11/1998). Stipulation No. 4; Exhs. S-139a, S-139b.
55. Dennison Trust (3/3/2000). Stipulation No. 4; Exhs. S-142a, S-142b.
56. Dennison (1/4/2001). Stipulation No. 4; Exhs. S-143a, S-143b.
57. Erbe (12/28/2001). Stipulation No. 4; Exhs. S-144a, S-144b.
58. Harris (5/14/1999). Stipulation No. 4; Exhs. S-145a, S-145b.
59. O'Connor Trust (8/21/2000). Stipulation No. 4; Exhs. S-147a, S-147b.
60. Thomsen Trust (2/29/2000). Stipulation No. 4; Exhs. S-149a, S-149b.
61. Neathery Trust (8/1/2001). Stipulation No. 4; Exhs. S-150a, S-150b.

1 behalf of ER Financial.⁹¹⁴

2 Mr. Bersch testified that before forming ER Financial as an LLC, he and Mr. Wanzek had done
3 business as ER Financial and Advisory Service.⁹¹⁵

4 Mr. Bersch testified that he had not destroyed, or directed another to destroy, ER Financial
5 records since being served with a subpoena by the Division, although at his examination under oath he
6 answered this question by invoking his Fifth Amendment privilege against self-incrimination.⁹¹⁶ Mr.
7 Bersch testified that he did not purposely terminate, or agree to have terminated, ER Financial in an
8 attempt to frustrate the Division's investigation into that company, although at his examination under
9 oath he answered this question by invoking his Fifth Amendment privilege against self-
10 incrimination.⁹¹⁷ Mr. Bersch testified that he had invoked the Fifth Amendment for substantially all of
11 the questions at the examination under oath.⁹¹⁸ Mr. Bersch testified that the examination under oath
12 had taken place approximately four years prior to the hearing and that the passage of time has lessened
13 the concerns that prompted him to invoke the Fifth Amendment.⁹¹⁹

14 Mr. Bersch testified that he "vaguely remember[ed]" an undated letter sent to "our Portfolio
15 Investors" attributed to him and Mr. Wanzek, but he could not recall writing or approving the letter.⁹²⁰

16
17 62. Bachmann Trust (8/8/2000). Stipulation No. 4; Exhs. S-151a, S-151b.

63. Brockmeier / Carlisle (1/1/2000). Stipulation No. 4; Exhs. S-154a, S-154b.

18 ⁹¹⁴ The sixteen Custodial Agreements signed by an unidentified person on behalf of ER Financial include:

1. Singleton Trust (5/7/2002). Tr. at 1660-1661, 1919; Exhs. S-6a, S-6b.

2. Philips Trust (8/5/1999). Tr. at 1661, 1920; Exhs. S-9a, S-9b.

3. Tarrant (7/8/2004). Exhs. 15a, 15b.

4. Gayle/Caputo (1/19/2007). Tr. at 1662, 1920-1921; Exhs. S-27a, S-27b.

5. Foti (8/30/2006). Tr. at 1663, 1921; Exhs. S-39a, S-39b.

6. Weiss Family Trust (5/10/2006). Tr. at 1665, 1921-1922; Exhs. S-67a, S-67b.

7. Haiar (12/17/2003). Exhs. S-83a, S-83b.

8. Schultz (7/19/2002). Tr. at 1667, 1922; Exhs. S-84a, S-84b.

9. Schultz (7/19/2002). Tr. at 1667, 1922-1923; Exhs. S-85a, S-85b.

10. Adams (6/13/2002). Exhs. S-97a, S-97b.

11. Hospice of Havasu (12/1/2005). Tr. at 1679, 1924; Exhs. S-111a, S-111b.

12. Farmer (12/17/2006). Exhs. S-113a, S-113b.

13. Holmes (3/1/2000). Exhs. S-119c, S-119d.

14. Chase Trust (3/1/2000). Exhs. S-141a, S-141b.

15. Nevaril (5/5/2000). Tr. at 1684; Exhs. S-146a, S-146b.

16. Pierce Trust (10/23/2000). Tr. at 1684, 1924-1925; Exhs. S-148a, S-148b.

⁹¹⁵ Tr. at 1909-1910.

⁹¹⁶ Tr. at 1910-1911; Exh. S-173 at 32.

⁹¹⁷ Tr. at 1912; Exh. S-173 at 34-35.

⁹¹⁸ Tr. at 1933.

⁹¹⁹ Tr. at 1933-1934.

⁹²⁰ Tr. at 1925-1928; Exh. S-2f.

1 The letter stated that the financial position of Concordia was “excellent” and told investors to “let us
2 know” when they had additional funds to invest in Concordia.⁹²¹ Mr. Bersch testified that his normal
3 practice was to sign his letters, while this letter had his and Mr. Wanzek’s names typed at the bottom.⁹²²

4 Mr. Bersch testified that he was not involved in the return of vehicle titles and Conditional Sales
5 Contracts to Concordia in November 2010.⁹²³ Mr. Bersch testified that he never applied to be licensed
6 as an escrow agent with the Arizona Department of Financial Institutions and that ER Financial has
7 never been licensed as an escrow business.⁹²⁴ Mr. Bersch testified that prior to the Division moving to
8 file the Amended Notice, he had never heard of the escrow licensing requirements of the Arizona
9 Department of Financial Institutions, none of the investors ever asked about escrow licensing, and he
10 was never advised that he needed an escrow license by Concordia’s lawyers, accountants, financial
11 advisors, or bankers.⁹²⁵

12 Mr. Bersch testified that he never consulted an attorney as to whether the Servicing Agreements
13 and Custodial Agreements might constitute securities under Arizona law, or whether it was appropriate
14 to offer them as providing for the safety of the investor’s principal amount, as liquid investments, or as
15 investments paying guaranteed returns.⁹²⁶ Mr. Bersch testified that his definition of a liquid investment
16 would be one where an investor could request some of the money from his investment and it would be
17 readily available to return to him.⁹²⁷ Mr. Bersch testified that he told some investors or potential
18 investors in Concordia that making an investment with the company would be a liquid investment.⁹²⁸

19 Mr. Bersch testified that he was aware of the October 7, 2013 Desist and Refrain Order issued
20 in California, but he did not respond to it because: there were no direct financial repercussions from
21 that order, he could only afford representation for one matter, and he had no intention of selling
22 investments in the future.⁹²⁹ Mr. Bersch testified that he did not contest allegations by the State of
23 California that he sold Concordia’s Servicing Agreements by means of material misrepresentations,

24 ⁹²¹ Tr. at 1926-1927; Exh. S-2f.

25 ⁹²² Tr. at 1936; Exh. S-2f.

26 ⁹²³ Tr. at 1928.

27 ⁹²⁴ Tr. at 1928.

28 ⁹²⁵ Tr. at 1759-1760.

⁹²⁶ Tr. at 1929-1930.

⁹²⁷ Tr. at 1932.

⁹²⁸ Tr. at 1932.

⁹²⁹ Tr. at 1754-1755.

1 and that there now exists a final order entered by the State of California finding that he violated the
 2 state's securities law.⁹³⁰ Mr. Bersch testified that he did not contest the order for financial reasons as
 3 he had limited funds and chose to use those for the more serious charges in the present case as there
 4 would be no ramifications financially and no reporting requirements regarding his CPA license arising
 5 from the California order.⁹³¹ On recross-examination, Mr. Bersch admitted that he could have
 6 attempted to represent himself in California and that he did not know whether there could be potential
 7 ramifications to his license if the Arizona accountancy board found out about the California order.⁹³²

8 Mr. Bersch testified that he and Mr. Wanzek flew in Randy Albers' plane to a meeting with
 9 Kansas City Life in Kansas City.⁹³³

10 Roger Fosseen

11 Mr. Fosseen testified that he is retired and living in Lake Havasu City, Arizona, after having
 12 been a commercial banker for nearly 30 years.⁹³⁴ Mr. Fosseen testified that he owns 60 to 70 stock
 13 investments as well as real estate investments.⁹³⁵ Mr. Fosseen testified that he invested approximately
 14 \$600,000 or \$700,000 in Concordia after being offered the investment by his accountants, Mr. Wanzek
 15 and Mr. Bersch.⁹³⁶ Mr. Fosseen testified that he considered the money he put into Concordia to be an
 16 investment, not a loan.⁹³⁷ Mr. Fosseen testified that he was in Lake Havasu City when he made the
 17 investment.⁹³⁸ Mr. Fosseen testified that Mr. Wanzek provided him with some papers and a brochure
 18 about the Concordia investment.⁹³⁹ Mr. Fosseen testified that he understood the investment to be
 19 buying into a pool of loans to persons with less than satisfactory credit so they could buy used trucks
 20 for shipping.⁹⁴⁰ Mr. Fosseen testified that he could not recall what risks Mr. Bersch and Mr. Wanzek
 21 described regarding the Concordia investment, but he felt that his experience as a commercial banker
 22 made him somewhat familiar with what Concordia was doing and he knew there were risks to the

23 ⁹³⁰ Tr. at 1930-1931; Exh. S-176b.

24 ⁹³¹ Tr. at 1936-1937.

⁹³² Tr. at 1943-1944.

25 ⁹³³ Tr. at 1937-1938.

⁹³⁴ Tr. at 1958.

26 ⁹³⁵ Tr. at 1959, 1962, 1965-1967.

⁹³⁶ Tr. at 1958-1959, 1973-1974.

27 ⁹³⁷ Tr. at 1988.

⁹³⁸ Tr. at 1997.

⁹³⁹ Tr. at 1973-1974.

28 ⁹⁴⁰ Tr. at 1960.

1 investment.⁹⁴¹ Mr. Fosseen testified that he assumed that Mr. Bersch and Mr. Wanzek indicated that
 2 investors could take their money out.⁹⁴² Mr. Fosseen testified that he was told prior to investing that
 3 ER Financial would be paid a finder's fee and that all salesmen get paid for being a salesman.⁹⁴³ Mr.
 4 Fosseen testified that he decided to invest in Concordia within thirty days of learning about the
 5 company and he was "pretty sure" he gave his check to either Mr. Bersch or Mr. Wanzek.⁹⁴⁴ Mr.
 6 Fosseen testified that at the time he made his investment, his net worth, excluding his residence, was
 7 in excess of \$1 million and that Mr. Bersch or Mr. Wanzek should have known his net worth based
 8 upon his reporting of dividend income.⁹⁴⁵

9 Mr. Fosseen testified that he believed over the years he received a total return reflecting a 5 to
 10 6 percent profit on his investment and that he also claimed losses on his tax return when he did not
 11 receive the entirety of his principal.⁹⁴⁶ Mr. Fosseen blamed the economy for the Concordia
 12 investment's failure to reach the promised return of twelve percent, but he testified that he is happy
 13 with the return he did receive on his investment.⁹⁴⁷ On cross-examination, Mr. Fosseen testified that
 14 Concordia's records correctly stated that he was still owed \$57,842 of principal on his investment,
 15 which would be a loss rather than a 5 to 6 percent profit, and that he used the losses to offset some
 16 profits he made in the sale of stock.⁹⁴⁸ Mr. Fosseen testified that he would not have invested had he
 17 known he would lose money, but he knew the risk factor was higher than with investments that paid a
 18 lower rate of return.⁹⁴⁹

19 Mr. Fosseen testified that Mr. Bersch had excellent character and spends a significant portion
 20 of his time raising money for nonprofits.⁹⁵⁰ Mr. Fosseen testified that he did not know Mr. Wanzek as
 21 well, but Mr. Fosseen considered him to be a good CPA and he did not believe Mr. Wanzek tried to
 22 take advantage of him.⁹⁵¹

23 ⁹⁴¹ Tr. at 1960, 1975-1976.

24 ⁹⁴² Tr. at 1977.

25 ⁹⁴³ Tr. at 1978.

26 ⁹⁴⁴ Tr. at 1977.

27 ⁹⁴⁵ Tr. at 1989.

28 ⁹⁴⁶ Tr. at 1960-1961, 1969.

⁹⁴⁷ Tr. at 1961-1963.

⁹⁴⁸ Tr., at 1972-1973.

⁹⁴⁹ Tr. at 1997-1998.

⁹⁵⁰ Tr. at 1963-1964.

⁹⁵¹ Tr. at 1964.

1 Mr. Fosseen testified that he withdrew \$100,000 from his Concordia investment in November
 2 2008 so he could buy stocks while the market was down.⁹⁵² Mr. Fosseen testified that he requested
 3 another \$50,000 from his investment in 2008, but he was told by Mr. Wanzek⁹⁵³ that there would be a
 4 delay as the company had cash flow difficulties.⁹⁵⁴ Mr. Fosseen testified that he had received
 5 information from Concordia beginning in 2008 stating that the company was in a bad financial
 6 position.⁹⁵⁵

7 Mr. Fosseen testified that before entering into the First Amendment, Concordia had provided
 8 him with documentation including lists of vehicles, but he did not recall seeing an audited financial
 9 statement.⁹⁵⁶ Mr. Fosseen testified that he could not recall a conversation between the First
 10 Amendment and the Second Amendment about the creation of a separate LLC, the proceeds of which
 11 would fund Concordia's operations.⁹⁵⁷ Mr. Fosseen testified that he did not request to see the titles or
 12 Conditional Sales Contracts, although he did see printouts with names and dollar amounts.⁹⁵⁸ Mr.
 13 Fosseen testified that he did not know who was supposed to hold the Conditional Sales Contracts and
 14 truck titles, but if the investment documents provided that Mr. Bersch and Mr. Wanzek, or ER
 15 Financial, was to hold them, Mr. Fosseen would expect them to do it.⁹⁵⁹ Mr. Fosseen testified that he
 16 did not believe Mr. Bersch or Mr. Wanzek informed him that they sent the Conditional Sales Contracts
 17 and truck titles back to Concordia in November 2010.⁹⁶⁰ Mr. Fosseen testified that he did not recall
 18 any conversation with Mr. Bersch or Mr. Wanzek where he was told that the State of California issued
 19 a Cease and Refrain Order against them which found that they violated the antifraud and registration
 20 statutes of California.⁹⁶¹

21 Mr. Fosseen testified that he did not recall ever having met or spoken with Ken or Chris
 22 Crowder.⁹⁶²

23 ⁹⁵² Tr. at 1969-1970.

24 ⁹⁵³ Mr. Fosseen testified he might also have spoken with Mr. Bersch about the withdrawal. Tr. at 1971.

25 ⁹⁵⁴ Tr. at 1970-1972.

26 ⁹⁵⁵ Tr. at 1994-1995.

27 ⁹⁵⁶ Tr. at 1979.

28 ⁹⁵⁷ Tr. at 1980.

⁹⁵⁸ Tr. at 1980-1981.

⁹⁵⁹ Tr. at 1981-1982.

⁹⁶⁰ Tr. at 1982.

⁹⁶¹ Tr. at 1987.

⁹⁶² Tr. at 1989-1990.

1 Cindy Aldridge

2 Ms. Aldridge testified that she and her husband are part-owners of a golf course in Lake Havasu
 3 City, Arizona.⁹⁶³ Ms. Aldridge testified that she was introduced to and sold the Concordia investment
 4 by her accountant, Charles Buttke.⁹⁶⁴ Ms. Aldridge testified that Mr. Buttke explained the investment
 5 as investors receiving monthly interest payments from loans to owners/operators for the purchase of
 6 trucks with the titles being held as collateral by Concordia.⁹⁶⁵ Ms. Aldridge testified that she could not
 7 recall whether Mr. Buttke told her about any risks with the investment.⁹⁶⁶ Ms. Aldridge testified that
 8 Mr. Buttke told her she could get her cash back at 95% at any time.⁹⁶⁷ Ms. Aldridge testified that in
 9 May 2009, she had sent demand letters to Chris Crowder asking for the return of her investment, but
 10 received form letters in return saying that Concordia could not pay the investors.⁹⁶⁸ Ms. Aldridge
 11 testified that she made a \$300,000 investment in Concordia in April of 2006.⁹⁶⁹ Ms. Aldridge testified
 12 that her investment was through a trust in which she and her husband were “both decision makers and
 13 ... beneficiaries.”⁹⁷⁰ Ms. Aldridge testified that ER Financial was the Custodian holding on to the truck
 14 loans, pursuant to the Custodial Agreement, although she did not know the identities of the principals
 15 of ER Financial.⁹⁷¹ Ms. Aldridge testified that she never requested to see the truck titles or financial
 16 information from Concordia.⁹⁷² Ms. Aldridge testified that no one from ER Financial ever told her that
 17 they sent the vehicle titles and truck contracts back to Concordia in November 2010.⁹⁷³

18 Ms. Aldridge testified that she suffered losses on the investment but she did not think she
 19 claimed the losses on her tax returns.⁹⁷⁴ Ms. Aldridge testified that she believed Concordia’s records
 20 showing that she was owed net principal in the amount of \$77,825.25 was correct.⁹⁷⁵ Ms. Aldridge
 21 testified that she did not blame Mr. Bersch or Mr. Wanzek for her losses and that she understood there

22 ⁹⁶³ Tr. at 2000.

23 ⁹⁶⁴ Tr. at 2000, 2014.

24 ⁹⁶⁵ Tr. at 2001, 2016.

25 ⁹⁶⁶ Tr. at 2018.

26 ⁹⁶⁷ Tr. at 2016.

27 ⁹⁶⁸ Tr. at 2016-2017, 2022-2025.

28 ⁹⁶⁹ Tr. at 2001, 2006.

⁹⁷⁰ Tr. at 2012.

⁹⁷¹ Tr. at 2015-2016.

⁹⁷² Tr. at 2017.

⁹⁷³ Tr. at 2018.

⁹⁷⁴ Tr. at 2001.

⁹⁷⁵ Tr. at 2014.

1 were risks in the investment.⁹⁷⁶ Ms. Aldridge testified that she did not want to receive restitution from
 2 Mr. Bersch or Mr. Wanzek.⁹⁷⁷ However, on cross-examination Ms. Aldridge testified that if the
 3 Servicing Agreement was unlawful, she felt that she should be entitled to restitution.⁹⁷⁸

4 Ms. Aldridge testified that she had known Mr. Bersch since approximately 2003, that he
 5 currently does her taxes, that he is involved with numerous community charities, and that she has a
 6 high opinion of his character.⁹⁷⁹ Ms. Aldridge testified that she believed the Lake Havasu City
 7 Community also has a high opinion of Mr. Bersch's character.⁹⁸⁰

8 Ms. Aldridge testified that as of the time she made her investment, she had about five years of
 9 experience in investing, which she had done with the assistance of others, including paid
 10 professionals.⁹⁸¹ Ms. Aldridge testified that she had accounts with two brokerages, one where the
 11 broker made specific investments with general direction from Mr. Aldridge, and another where she
 12 made specific investments that were mostly held long-term.⁹⁸² Ms. Aldridge testified that she also had
 13 real estate investments in commercial properties, rental houses, a commercial office building, and
 14 vacant land, which comprised approximately 45 to 50 percent of her total investments at the time.⁹⁸³
 15 Ms. Aldridge testified that she also had an investment in a gas well.⁹⁸⁴ Ms. Aldridge testified that her
 16 real estate and stock holdings lost value during the rough economic times in 2008 and 2009, although
 17 her stock losses were not "real significant."⁹⁸⁵

18 Ms. Aldridge testified that Mr. Bersch has been her accountant since 2011 and that she knew
 19 Mr. Wanzek as he lived two doors down from her.⁹⁸⁶

20 Ms. Aldridge testified that, in 2013, Lisa Fuhrman tried to sell her an additional investment in
 21 Concordia.⁹⁸⁷

23 ⁹⁷⁶ Tr. at 2001.

24 ⁹⁷⁷ Tr. at 2001.

25 ⁹⁷⁸ Tr. at 2021.

26 ⁹⁷⁹ Tr. at 2002.

27 ⁹⁸⁰ Tr. at 2005.

28 ⁹⁸¹ Tr. at 2006-2007.

⁹⁸² Tr. at 2008.

⁹⁸³ Tr. at 2008-2010.

⁹⁸⁴ Tr. at 2010-2011.

⁹⁸⁵ Tr. at 2011-2012.

⁹⁸⁶ Tr. at 2019.

⁹⁸⁷ Tr. at 2000.

1 Ms. Aldridge testified that from her \$300,000 investment in Concordia, she received back
2 \$24,000 in interest payments, \$96,000 in principal payments, and a final check that she believed was
3 in the amount of \$50,198.63.⁹⁸⁸

4 Ms. Aldridge testified that at the time she made her investment in Concordia, she had a net
5 worth greater than \$1 million, excluding her primary residence.⁹⁸⁹

6 Ms. Aldridge testified that she believed Concordia should have treated the investors fairly and
7 that she did not believe she was treated fairly because Concordia did not live up to the terms of the
8 contract.⁹⁹⁰

9 Kenneth Bourlier, Jr.

10 Mr. Bourlier testified that he is a self-employed plastering contractor residing in Lake Havasu
11 City, Arizona.⁹⁹¹ Mr. Bourlier testified that he invested \$150,000 in Concordia on November 13, 2008,
12 after being sold the investment by his CPA, Mr. Bersch.⁹⁹² Mr. Bourlier testified that at the time of his
13 investment he had a net worth greater than \$1 million, excluding the value of his primary residence,
14 and that Mr. Bersch would have known his net worth.⁹⁹³ Mr. Bourlier testified that prior to investing,
15 he was not told by Mr. Bersch that Mr. Bersch or his company would receive a finder's fee if Mr.
16 Bourlier invested.⁹⁹⁴ Mr. Bourlier testified that his understanding of the investment was that he would
17 receive a ten percent interest return off the purchase of truck deeds.⁹⁹⁵ Mr. Bourlier testified that he
18 informed Mr. Bersch on December 11, 2008, that he wanted to withdraw from the investment and that
19 he began contacting Chris Crowder on December 15 asking for the return of his investment.⁹⁹⁶ Mr.
20 Bourlier testified that he requested his money back because his father-in-law, who had previously
21 invested in Concordia, had received a letter from Concordia saying that they were not going to make
22 interest payments.⁹⁹⁷ Mr. Bourlier testified that he didn't think it was right that Concordia would take
23

24 ⁹⁸⁸ Tr. at 2013.

⁹⁸⁹ Tr. at 2022.

25 ⁹⁹⁰ Tr. at 2026-2027.

⁹⁹¹ Tr. at 2034, 2038.

26 ⁹⁹² Tr. at 2035-2036, 2044, 2046.

⁹⁹³ Tr. at 2050.

27 ⁹⁹⁴ Tr. at 2046.

⁹⁹⁵ Tr. at 2035.

⁹⁹⁶ Tr. at 2035, 2046-2048.

28 ⁹⁹⁷ Tr. at 2044, 2047.

1 his investment when very soon thereafter the company stopped paying interest.⁹⁹⁸ Mr. Bourlier testified
 2 that he received all of his investment back approximately six or seven months later, after being paid in
 3 monthly installments.⁹⁹⁹

4 Mr. Bourlier testified that he did not blame Mr. Wanzek or Mr. Bersch for any losses or non-
 5 losses he had in the investment and that he did not want the State to order Mr. Wanzek or Mr. Bersch
 6 to pay money to him.¹⁰⁰⁰ On cross-examination, Mr. Bourlier testified that since he received back his
 7 entire \$150,000 investment, he would have no reason to ask for restitution.¹⁰⁰¹

8 Mr. Bourlier testified that he has known Mr. Bersch since 1986, when Mr. Bersch did taxes for
 9 Mr. Bourlier's father.¹⁰⁰² Mr. Bourlier testified that he believed Mr. Bersch to be very knowledgeable
 10 in his CPA work and that he did a lot of fundraising for organizations in the community.¹⁰⁰³

11 Mr. Bourlier testified that he has several real estate investments held individually as well as one
 12 through a partnership and another through a development company.¹⁰⁰⁴ Mr. Bourlier testified that
 13 during 2008 and 2009 his real estate holdings suffered a few negative effects from the economy at the
 14 time.¹⁰⁰⁵ Mr. Bourlier testified that at the time of his investment in Concordia, he had no investment
 15 accounts but had experience with stocks and bonds through a broker.¹⁰⁰⁶

16 John Gilje

17 Mr. Gilje testified that he resides in Lake Havasu City, Arizona, where he has a construction
 18 company that does dry utilities.¹⁰⁰⁷ Mr. Gilje testified that Mr. Wanzek had been his accountant since
 19 1990, and that Mr. Wanzek had offered him financial opportunities in the past before asking Mr. Gilje
 20 if he wanted to invest in Concordia.¹⁰⁰⁸ Mr. Gilje testified that Mr. Wanzek did not mention a finder's
 21 fee paid by Concordia in connection with his investment.¹⁰⁰⁹ Mr. Gilje testified that he made two
 22

23 ⁹⁹⁸ Tr. at 2048.

⁹⁹⁹ Tr. at 2035-2036, 2049.

24 ¹⁰⁰⁰ Tr. at 2036.

¹⁰⁰¹ Tr. at 2047.

25 ¹⁰⁰² Tr. at 2036.

¹⁰⁰³ Tr. at 2036-2037.

26 ¹⁰⁰⁴ Tr. at 2038-2041.

¹⁰⁰⁵ Tr. at 2042.

27 ¹⁰⁰⁶ Tr. at 2042.

¹⁰⁰⁷ Tr. at 2057, 2062.

28 ¹⁰⁰⁸ Tr. at 2057.

¹⁰⁰⁹ Tr. at 2083.

1 investments in Concordia of about \$100,000 each, although he could not recall when he made the
 2 investments.¹⁰¹⁰ Mr. Gilje testified that at the time of his investment, he had a net worth greater than
 3 \$1 million, excluding the value of his primary residence, and that Mr. Wanzek would have had “a good
 4 idea” of his net worth since he had been Mr. Gilje’s accountant for 15 to 20 years at the time.¹⁰¹¹ Mr.
 5 Gilje testified that at the time of his investment, he was unmarried and that his income would have been
 6 approximately \$250,000, an amount that Mr. Wanzek would have known.¹⁰¹² Mr. Gilje made his
 7 investment by giving a check to Mr. Wanzek.¹⁰¹³ Mr. Gilje testified that he understood the investment
 8 to involve truck loans, that it paid high interest, and that with high interest comes high risk.¹⁰¹⁴ Mr.
 9 Gilje testified that he believed he got a substantial amount of his Concordia investment back, but he
 10 could not recall if he suffered any losses on it.¹⁰¹⁵ Mr. Gilje testified that he did not blame Mr. Wanzek
 11 or Mr. Bersch for any losses he may have suffered and he did not want the State to give him money
 12 from them.¹⁰¹⁶

13 Mr. Gilje testified that he thinks Mr. Wanzek is “a good guy” and that he has never heard
 14 anything negative about Mr. Wanzek in the Lake Havasu City community.¹⁰¹⁷ Mr. Gilje testified that
 15 he did not know other persons in Lake Havasu City who invested in Concordia.¹⁰¹⁸ On cross
 16 examination, Mr. Gilje testified that he did not know what other investors were told about the
 17 investment.¹⁰¹⁹

18 Mr. Gilje testified that his construction company was hit by the economic conditions of 2008
 19 and 2009, resulting in less work for employees and layoffs.¹⁰²⁰ Mr. Gilje testified that, at the time of
 20 his investment in Concordia, he did not have any investment or brokerage accounts but he had real
 21

22 ¹⁰¹⁰ Tr. at 2058, 2061-2062. The evidence of record establishes that John Gilje, Inc. made three total investments:
 23 \$85,770.55 on December 8, 1999; \$99,600.52 on March 1, 2000; and \$104,221.93 on October 5, 2001. Exhs. S-157a, S-
 158a, S-159a.

24 ¹⁰¹¹ Tr. at 2073.

¹⁰¹² Tr. at 2074.

25 ¹⁰¹³ Tr. at 2057-2058, 2067.

¹⁰¹⁴ Tr. at 2058, 2067-2068.

26 ¹⁰¹⁵ Tr. at 2059.

¹⁰¹⁶ Tr. at 2059.

27 ¹⁰¹⁷ Tr. at 2060.

¹⁰¹⁸ Tr. at 2069, 2072.

¹⁰¹⁹ Tr. at 2072-2073.

28 ¹⁰²⁰ Tr. at 2063, 2066.

1 estate investments.¹⁰²¹ Mr. Gilje testified that his investment homes lost value in the 2008-2009 time
2 period.¹⁰²²

3 Mr. Gilje testified that he was aware of other businesses that suffered substantial cut backs or
4 went out of business completely during the recession.¹⁰²³ Mr. Gilje testified that in his opinion, it
5 would be better for an entity to fulfill the terms of a contract as best it could rather than go bankrupt.¹⁰²⁴

6 Gerald J. Hoffort

7 Mr. Hoffort testified that he is a retired resident of Lake Havasu City, Arizona, having formerly
8 owned a farm equipment dealership and a storage facility.¹⁰²⁵ Mr. Hoffort testified that he learned
9 about the investment in Concordia from his accountant, Mr. Wanzek, who suggested it.¹⁰²⁶ Mr. Hoffort
10 testified that Mr. Wanzek told him about attractive features of the Concordia investment, including the
11 high interest rate and the holding of the truck titles which added security to the investment.¹⁰²⁷ Mr.
12 Hoffort testified that he knew there were risks involved in the investment, such as if the truck driver
13 did not repay the loan.¹⁰²⁸ Mr. Hoffort testified that he and his wife invested \$100,000 in Concordia in
14 December 2004.¹⁰²⁹ Mr. Hoffort testified that he understood the investment involved loans on big rig
15 trucks, with Mr. Wanzek's firm holding the titles of the vehicles as security, and it would pay investors
16 monthly interest at a rate of ten percent.¹⁰³⁰

17 Mr. Hoffort testified that he received interest payments from 2004 to 2009, and then he received
18 principal payments in about the same amount from 2009 to 2013.¹⁰³¹ Mr. Hoffort testified that he
19 suffered losses on this investment, which he claimed on his tax returns.¹⁰³² Mr. Hoffort testified that
20 he lost about \$40,000 on his investment.¹⁰³³ Mr. Hoffort testified that he does not blame Mr. Wanzek
21 or Mr. Bersch for his losses and that he does not want the State to give him money taken from Mr.

22 ¹⁰²¹ Tr. at 2064-2065.

23 ¹⁰²² Tr. at 2066.

24 ¹⁰²³ Tr. at 2076-2077.

25 ¹⁰²⁴ Tr. at 2077.

26 ¹⁰²⁵ Tr. at 2086.

27 ¹⁰²⁶ Tr. at 2086, 2090.

28 ¹⁰²⁷ Tr. at 2090.

¹⁰²⁸ Tr. at 2087.

¹⁰²⁹ Tr. at 2086-2087, 2089-2090.

¹⁰³⁰ Tr. at 2086-2087.

¹⁰³¹ Tr. at 2087.

¹⁰³² Tr. at 2088.

¹⁰³³ Tr. at 2095-2096.

1 Wanzek or Mr. Bersch, but he thinks the money should come from Concordia.¹⁰³⁴ Mr. Hoffort testified
 2 that he thinks Mr. Wanzek's character is "outstanding" and he has recommended his accounting firm
 3 to friends.¹⁰³⁵

4 Mr. Hoffort testified that it was his understanding that Mr. Bersch and Mr. Wanzek held the
 5 truck titles on his investment.¹⁰³⁶ Mr. Hoffort testified that Mr. Bersch and Mr. Wanzek never asked
 6 his permission to send his truck titles back to Concordia.¹⁰³⁷ Mr. Hoffort testified that he thought he
 7 could request his principal back at any time.¹⁰³⁸

8 Mr. Hoffort testified that he signed the First Amendment to the Servicing Agreement in
 9 2009.¹⁰³⁹ Mr. Hoffort testified that he was not given an opportunity to negotiate or provide input on
 10 the First Amendment, but he talked with Chris Crowder who said that there would be no more interest
 11 as a result of the way the economy had gone.¹⁰⁴⁰

12 Mr. Hoffort testified that at the time he made his investment in Concordia, his net worth,
 13 excluding his primary residence, was less than \$1 million.¹⁰⁴¹ Mr. Hoffort testified that at the time he
 14 made his investment in Concordia, his combined income with his spouse was less than \$300,000.¹⁰⁴²
 15 Mr. Hoffort testified that at the time of his investment, Mr. Wanzek would have known his annual
 16 income, but he did not think Mr. Wanzek would have known his net worth.¹⁰⁴³ Mr. Hoffort testified
 17 that Mr. Wanzek never mentioned finder's fees being paid pursuant to the investment.¹⁰⁴⁴

18 Lea Rae Nichols

19 Ms. Nichols testified that she is retired, having formerly owned an electrical contracting
 20 corporation.¹⁰⁴⁵ Ms. Nichols testified that she inherited a Concordia investment that her mother,
 21 Florence McCullough, had purchased through a family trust.¹⁰⁴⁶ Ms. Nichols testified that her mother

22 ¹⁰³⁴ Tr. at 2088, 2096.

23 ¹⁰³⁵ Tr. at 2088.

24 ¹⁰³⁶ Tr. at 2091.

25 ¹⁰³⁷ Tr. at 2091.

26 ¹⁰³⁸ Tr. at 2091-2092.

27 ¹⁰³⁹ Tr. at 2092-2093.

28 ¹⁰⁴⁰ Tr. at 2093-2094.

¹⁰⁴¹ Tr. at 2097.

¹⁰⁴² Tr. at 2097.

¹⁰⁴³ Tr. at 2097.

¹⁰⁴⁴ Tr. at 2098.

¹⁰⁴⁵ Tr. at 2102.

¹⁰⁴⁶ Tr. at 2102, 2106.

1 was retired, having formerly owned “a 5 and 10 Cent Store.”¹⁰⁴⁷ Ms. Nichols testified that the trust
 2 had approximately \$200,000 in assets and that it did “not really” have any other investments.¹⁰⁴⁸ Ms.
 3 Nichols testified that the Concordia investment was sold to her mother by Mr. Buttke and that Ms.
 4 Nichols was present when Mr. Buttke discussed the investment with her mother.¹⁰⁴⁹ Ms. Nichols
 5 testified that her mother invested \$60,000 in Concordia on August 28, 2002.¹⁰⁵⁰ Ms. Nichols testified
 6 that she understood the investment was in a California company that loaned money to truckers who
 7 could not get regular loans and that the investment was secured by the trucks.¹⁰⁵¹ Ms. Nichols testified
 8 that she reinvested the interest in the Concordia investment every year and that her investment had a
 9 balance of \$129,402.80 as of February 2009.¹⁰⁵² Ms. Nichols testified that she had losses in the
 10 investment totaling \$71,172, and that she claimed the losses on her tax returns.¹⁰⁵³ Ms. Nichols testified
 11 that she does not blame Mr. Wanzek or Mr. Bersch for the losses and that she does not want the State
 12 to give her money taken from Mr. Wanzek or Mr. Bersch.¹⁰⁵⁴ However, Ms. Nichols testified that if
 13 the Commission finds that the Concordia investment was sold in violation of securities laws, she
 14 “would love” to receive an order of restitution in connection with her mother’s investment, although
 15 she did not feel Mr. Wanzek and Mr. Bersch were as liable as the CEO of Concordia.¹⁰⁵⁵

16 Ms. Nichols testified that she has known Mr. Bersch since approximately December 2008.¹⁰⁵⁶
 17 Ms. Nichols testified that she has a very high opinion of Mr. Bersch, that other people she knows like
 18 him, and that he has done charitable work in the community.¹⁰⁵⁷

19 Ms. Nichols testified that she was not familiar with ER Financial and that she was never told
 20 where the truck loans and vehicle titles were going to be held.¹⁰⁵⁸ Ms. Nichols testified that she was
 21 with her mother at all meetings involving the Concordia investment and the liquidity of the investment
 22

23 ¹⁰⁴⁷ Tr. at 2107.

24 ¹⁰⁴⁸ Tr. at 2107.

25 ¹⁰⁴⁹ Tr. at 2102, 2108.

26 ¹⁰⁵⁰ Tr. at 2102-2103, 2107.

27 ¹⁰⁵¹ Tr. at 2103, 2108-2109.

28 ¹⁰⁵² Tr. at 2110, 2116-2117.

¹⁰⁵³ Tr. at 2103, 2110.

¹⁰⁵⁴ Tr. at 2103.

¹⁰⁵⁵ Tr. at 2110, 2113.

¹⁰⁵⁶ Tr. at 2104.

¹⁰⁵⁷ Tr. at 2104-2105.

¹⁰⁵⁸ Tr. at 2109.

1 was never discussed.¹⁰⁵⁹ Ms. Nichols testified that she never met Kenneth Crowder.¹⁰⁶⁰

2 Ms. Nichols testified that, beginning in 2009, she began receiving checks from Concordia for
3 the return of capital on her investment.¹⁰⁶¹ Ms. Nichols testified that she received \$12,883.74 in 2009,
4 \$15,528.36 in 2010, \$15,528.36 in 2011, and \$14,337.06 in 2012, for a total of \$58,277.52.¹⁰⁶²

5 Frank Foti

6 Mr. Foti testified that he is a semi-retired resident of Lake Havasu City, Arizona, having
7 previously worked as a firefighter for the city for 23 years and having owned a private ambulance
8 company for 26 years.¹⁰⁶³ Mr. Foti testified that he was an investor in Concordia.¹⁰⁶⁴ Mr. Foti testified
9 that he invested in Concordia through Mr. Wanzek, his personal and business accountant, who handled
10 the paperwork for Mr. Foti's investment.¹⁰⁶⁵ Mr. Foti testified that he believed the investment came
11 from a Mr. Crowder in California, but he did not speak with Mr. Crowder prior to investing.¹⁰⁶⁶ Mr.
12 Foti testified that he knew family members who had also invested in Concordia.¹⁰⁶⁷

13 Mr. Foti testified that, to the best of his recollection, he had made an initial investment prior to
14 the sale of his ambulance company, in the amount of \$50,000 or \$100,000, and a second investment in
15 June 2008, in the amount of \$50,000 or \$100,000 from an IRA rollover.¹⁰⁶⁸ Mr. Foti testified that he
16 received the interest on the first investment and let the interest accrue on the second.¹⁰⁶⁹ Mr. Foti
17 testified that he did not know specific information about the business other than it involved the trucking
18 industry and it was paying "great monthly returns."¹⁰⁷⁰ Mr. Foti testified that Mr. Wanzek did not push
19 the investment on him but he found it significant that Mr. Wanzek's mother was an investor.¹⁰⁷¹ Mr.
20 Foti testified that he knew the investment had some risks, as do all investments.¹⁰⁷² Mr. Foti testified

21
22 ¹⁰⁵⁹ Tr. at 2009-2110, 2117.

¹⁰⁶⁰ Tr. at 2117.

23 ¹⁰⁶¹ Tr. at 2114.

¹⁰⁶² Tr. at 2114-2116.

24 ¹⁰⁶³ Tr. at 2120-2121, 2128.

¹⁰⁶⁴ Tr. at 2121.

25 ¹⁰⁶⁵ Tr. at 2121.

¹⁰⁶⁶ Tr. at 2121.

26 ¹⁰⁶⁷ Tr. at 2121, 2137.

¹⁰⁶⁸ Tr. at 2122, 2139, 2141-2142.

¹⁰⁶⁹ Tr. at 2134.

27 ¹⁰⁷⁰ Tr. at 2122-2123.

¹⁰⁷¹ Tr. at 2123, 2137-2138, 2140-2141.

28 ¹⁰⁷² Tr. at 2123.

1 that escrow licensing played no part in his decision to invest.¹⁰⁷³ Mr. Foti testified that he was not
 2 aware of a finder's fee at the time he invested, but that he would not have been surprised by the
 3 existence of one.¹⁰⁷⁴

4 Mr. Foti testified that he suffered losses on his investment which were claimed on his tax
 5 returns.¹⁰⁷⁵ Mr. Foti testified that he does not blame Mr. Wanzek or Mr. Bersch for his losses and that
 6 he does not want the State to give him money taken from Mr. Wanzek or Mr. Bersch.¹⁰⁷⁶

7 Mr. Foti testified that he has known Mr. Wanzek for 27 years, that Mr. Wanzek is a personal
 8 friend whom he trusts, and that he believes Mr. Wanzek has exceptional character.¹⁰⁷⁷ Mr. Foti testified
 9 that Mr. Wanzek is held in high regard and credibility in the community.¹⁰⁷⁸

10 Mr. Foti testified that he was able to "live the American dream," starting his business in 1981
 11 with six employees and selling it in 2006 with 110 employees.¹⁰⁷⁹ Mr. Foti testified that his investing
 12 experience in 2006 involved real estate and a deferred compensation plan through Lake Havasu City
 13 that was managed by a firm.¹⁰⁸⁰ Mr. Foti testified that he, his mother, and his brother also were
 14 members of an LLC that purchased real estate for use as stations for the ambulance company.¹⁰⁸¹

15 Mr. Foti testified that he was not told before making his second investment that Concordia
 16 suffered a net loss of \$836,000 in 2006, however, Mr. Foti testified that there could be lots of reasons
 17 for a loss and that the information would not have mattered to him unless Mr. Wanzek thought it was
 18 a reason to adjust Mr. Foti's investment plans.¹⁰⁸² Mr. Foti testified that he would have expected Mr.
 19 Wanzek to tell Mr. Foti if there was a reason to hold off on his making a second investment.¹⁰⁸³ Mr.
 20 Foti testified that, prior to making his second investment, he was not informed that Concordia had a
 21 loss of \$1,055,000 for the fiscal year ending December 31, 2007.¹⁰⁸⁴ Mr. Foti testified that sometime
 22

23 ¹⁰⁷³ Tr. at 2123-2124.

24 ¹⁰⁷⁴ Tr. at 2125.

25 ¹⁰⁷⁵ Tr. at 2124.

26 ¹⁰⁷⁶ Tr. at 2124-2125.

27 ¹⁰⁷⁷ Tr. at 2125-2126.

28 ¹⁰⁷⁸ Tr. at 2126.

¹⁰⁷⁹ Tr. at 2130, 2132.

¹⁰⁸⁰ Tr. at 2132, 2134-2135.

¹⁰⁸¹ Tr. at 2135-2136.

¹⁰⁸² Tr. at 2142-2144.

¹⁰⁸³ Tr. at 2145-2146.

¹⁰⁸⁴ Tr. at 2146.

1 after his second investment, he began receiving reports, with his interest statements from Mr. Crowder,
2 showing financial difficulties being suffered by Concordia.¹⁰⁸⁵

3 Mr. Foti testified that at the time he made his first investment, his net worth, excluding his
4 primary residence would have been greater than \$1,000,000 if he included the stock in his ambulance
5 company, although the value of the stock would not have been known at the time.¹⁰⁸⁶ Mr. Foti testified
6 that at the time of both of his investments in Concordia, he would have been married and his joint
7 income with his spouse would have been greater than \$300,000.¹⁰⁸⁷ Mr. Foti testified that Mr. Wanzke
8 knew Mr. Foti's net worth and annual income at the time of both investments.¹⁰⁸⁸

9 Margaret LaLande

10 Ms. LaLande testified that she is a resident of Las Vegas, Nevada.¹⁰⁸⁹ Ms. LaLande testified
11 that she has known Mr. Bersch since the 1980's and that he has been her friend and accountant since
12 the late 1990's.¹⁰⁹⁰ Ms. LaLande testified that she was not an investor in Concordia although Mr.
13 Bersch did tell her about Concordia and asked if she wanted to invest.¹⁰⁹¹ Ms. LaLande testified that
14 she thinks highly of Mr. Bersch, that he has been involved in fundraising for charitable organizations,
15 and that he helped pay the bills for an elderly neighbor who was struggling financially.¹⁰⁹² Ms.
16 LaLande testified that she thought everyone in the community "loves" Mr. Bersch, although some
17 people were upset with him over some investments when the economy had a down turn in 2006 or
18 2007.¹⁰⁹³

19 Kenneth Edward Moyer

20 Mr. Moyer testified that he is an attorney residing in Lake Havasu City, Arizona.¹⁰⁹⁴ Mr. Moyer
21 testified that he was not an investor in Concordia and Mr. Bersch never discussed the investment with
22
23

24 ¹⁰⁸⁵ Tr. at 2147-2148.

¹⁰⁸⁶ Tr. at 2148-2149.

25 ¹⁰⁸⁷ Tr. at 2149-2151.

¹⁰⁸⁸ Tr. at 2151.

26 ¹⁰⁸⁹ Tr. at 2171.

¹⁰⁹⁰ Tr. at 2171-2172.

27 ¹⁰⁹¹ Tr. at 2171, 2174.

¹⁰⁹² Tr. at 2172.

28 ¹⁰⁹³ Tr. at 2172-2173.

¹⁰⁹⁴ Tr. at 2178.

1 him.¹⁰⁹⁵ Mr. Moyer testified that he has known Mr. Bersch since late 1999 or early 2000.¹⁰⁹⁶ Mr.
 2 Moyer testified that he initially met Mr. Bersch as their offices were next door to one another.¹⁰⁹⁷ Mr.
 3 Moyer testified that one of his firm's partners at the time recommended Mr. Bersch as being a good
 4 accountant and Mr. Bersch has done Mr. Moyer's taxes for several years.¹⁰⁹⁸ Mr. Moyer testified that
 5 he holds Mr. Bersch in high regard and that Mr. Bersch has done fundraising for a number of local
 6 charities.¹⁰⁹⁹ Mr. Moyer testified that other people in the Lake Havasu City community have similar
 7 respect for Mr. Bersch.¹¹⁰⁰

8 Michael Edward Carr

9 Mr. Carr testified that he is a resident of Lake Havasu City, Arizona, who works in the insurance
 10 industry, formerly having owned an insurance agency that he sold in 2006.¹¹⁰¹ Mr. Carr testified that
 11 he has been in the insurance industry since being licensed in 1981, and that he has sold various types
 12 of insurance over the years, including commercial business insurance, homeowners, auto, life, health,
 13 and disability coverage.¹¹⁰² Mr. Carr testified that he is an investor in Concordia.¹¹⁰³ Mr. Carr testified
 14 that he learned about the Concordia investment in a conversation with Mr. Bersch, and that he made
 15 an initial investment of \$100,000 in 2006, with a second investment made later.¹¹⁰⁴ Mr. Carr testified
 16 that he understood the investment as buying into a company that did loans for the short haul trucking
 17 industry.¹¹⁰⁵ Mr. Carr testified that he knew there were risks involved in the Concordia investment and
 18 that the 10 percent interest rate indicated that the investment "was a little bit riskier than other
 19 things."¹¹⁰⁶ Mr. Carr could not recall Mr. Bersch mentioning any specific risks involved in the
 20 investment.¹¹⁰⁷

21
 22

 1095 Tr. at 2180.

23 1096 Tr. at 2178.

1097 Tr. at 2178.

24 1098 Tr. at 2178.

1099 Tr. at 2178-2179.

25 1100 Tr. at 2179.

1101 Tr. at 2184.

26 1102 Tr. at 2191-2192, 2200-2201.

1103 Tr. at 2184.

27 1104 Tr. at 2184-2185, 2197-2198.

1105 Tr. at 2185, 2196.

28 1106 Tr. at 2185-2186.

1107 Tr. at 2213.

1 Mr. Carr testified that his total investment in Concordia was \$200,000.¹¹⁰⁸ Mr. Carr testified
 2 that while most of his records had been destroyed in a hurricane when he lived on the Virgin Islands,
 3 he believed that he got back \$140,000 to \$150,000 from his investment in Concordia.¹¹⁰⁹ Mr. Carr
 4 testified that he claimed some of his losses on the Concordia investment on his tax returns.¹¹¹⁰ Mr.
 5 Carr testified that he does not blame Mr. Wanzek or Mr. Bersch for his losses and that he does not want
 6 the State to give him money taken from Mr. Wanzek or Mr. Bersch.¹¹¹¹ Mr. Carr testified that he did
 7 not feel that Mr. Bersch and Mr. Wanzek should be held responsible for his losses as he knew the
 8 investment was risky and the company failed because “the entire economy went bad” in 2008 and
 9 2009.¹¹¹² Mr. Carr testified that if the Commission finds the Concordia investments were sold in
 10 violation of securities laws, he would like to receive restitution, but he would not want it to come from
 11 Mr. Bersch and Mr. Wanzek.

12 Mr. Carr testified that the existence or nonexistence of an escrow license from the Arizona
 13 Department of Financial Institutions played no part in his decision to invest in Concordia.¹¹¹³

14 Mr. Carr testified that he has known Mr. Bersch and Mr. Wanzek since about 1989 or 1990
 15 when he moved his business accounting to their firm.¹¹¹⁴ Mr. Carr testified that he has the utmost
 16 respect for both Mr. Bersch and Mr. Wanzek.¹¹¹⁵ Mr. Carr testified that Mr. Bersch is well-known in
 17 the community for his charitable work and that folks in the community consider Mr. Bersch a “go-to
 18 person” if you need assistance.¹¹¹⁶ Mr. Carr testified that Mr. Wanzek is a “family man” and an
 19 “amazing” human being.¹¹¹⁷

20 Mr. Carr testified that he did some investing in real estate individually and as part of a couple
 21 real estate holding groups.¹¹¹⁸ Mr. Carr testified that he also had a 401(k) account, in which a number
 22

23 ¹¹⁰⁸ Tr. at 2186, 2198.

24 ¹¹⁰⁹ Tr. at 2186.

¹¹¹⁰ Tr. at 2187.

25 ¹¹¹¹ Tr. at 2187.

¹¹¹² Tr. at 2187.

26 ¹¹¹³ Tr. at 2188.

¹¹¹⁴ Tr. at 2188.

¹¹¹⁵ Tr. at 2188.

27 ¹¹¹⁶ Tr. at 2189-2190.

¹¹¹⁷ Tr. at 2190.

28 ¹¹¹⁸ Tr. at 2192-2193.

1 of stocks went down or the companies became defunct in 2008 and 2009.¹¹¹⁹

2 Mr. Carr testified that he could not remember if he was told by Mr. Bersch prior to making his
3 second investment that Concordia had lost \$836,000 at the end of fiscal year 2006 and over \$1 million
4 at the end of fiscal year 2007.¹¹²⁰ However, Mr. Carr testified that he would possibly have been
5 interested in knowing additional information like cash flow and balance sheets, but for this type of
6 investment he was mostly interested in the interest rate.¹¹²¹ Mr. Carr testified that Mr. Bersch did not
7 inform him prior to either of his investments that Concordia would pay Mr. Bersch a finders's fee if he
8 invested.¹¹²²

9 Mr. Carr testified that at the time he made his initial investment in Concordia, his net worth was
10 greater than \$1 million.¹¹²³ Mr. Carr testified that at the time he made his initial investment in
11 Concordia, his joint income with his spouse would have been more than \$300,000 per year.¹¹²⁴ Mr.
12 Carr testified that at the time he made his initial investment, Mr. Bersch would have had no reason to
13 know Mr. Carr's net worth.¹¹²⁵ Mr. Carr testified that at the time he made his initial investment, Mr.
14 Bersch may have known his annual income if Mr. Bersch was still with the accounting firm that was
15 doing his taxes, but Mr. Carr could not remember if he was, nor could Mr. Carr remember if he was
16 asked about his net worth or income.¹¹²⁶ Mr. Carr testified that at the time he made his second
17 investment, his net worth excluding his primary residence was greater than \$1 million and his joint
18 income with his spouse would have been less than \$300,000.¹¹²⁷ Mr. Carr testified that at the time of
19 his second investment, Mr. Bersch would not have had a basis to know Mr. Carr's income or net worth
20 as Mr. Bersch was no longer at the accounting firm, however, Mr. Carr could not recall if he was
21 specifically asked for that information.¹¹²⁸ Mr. Carr testified that Mr. Wanzek would have known Mr.
22 Carr's income at the time of both investments as Mr. Wanzek would have been his accountant, taking
23

24 ¹¹¹⁹ Tr. at 2193-2195.

25 ¹¹²⁰ Tr. at 2198-2199.

26 ¹¹²¹ Tr. at 2215.

27 ¹¹²² Tr. at 2200.

28 ¹¹²³ Tr. at 2209-2210.

¹¹²⁴ Tr. at 2210.

¹¹²⁵ Tr. at 2210.

¹¹²⁶ Tr. at 2210-2211.

¹¹²⁷ Tr. at 2211-2212.

¹¹²⁸ Tr. at 2211-2212.

1 over after Mr. Bersch.¹¹²⁹

2 Bob Samons

3 Mr. Samons testified that he is a construction worker residing in Lake Havasu City, Arizona.¹¹³⁰
 4 Mr. Samons testified that he has known Mr. Wanzek since 1999 or 2000, when he was referred to Mr.
 5 Wanzek for a tax issue.¹¹³¹ Mr. Samons testified that he is not an investor in Concordia and neither
 6 Mr. Bersch nor Mr. Wanzek ever spoke to him about potentially investing in the company.¹¹³² Mr.
 7 Samons testified that he thinks Mr. Wanzek is “a good guy” who does a lot to help people.¹¹³³ Mr.
 8 Samons testified that Mr. Wanzek is very involved with his children and the community.¹¹³⁴ Mr.
 9 Samons testified that Mr. Wanzek has a positive reputation in the community and the only person he’d
 10 ever heard speak negatively about Mr. Wanzek was a tax customer who could not document the work
 11 he wanted Mr. Wanzek to do.¹¹³⁵ Mr. Samons testified that one of Mr. Wanzek’s daughters is married
 12 to Mr. Samons’ son.¹¹³⁶

13 James Goldstein

14 Mr. Goldstein testified that he is a resident of Temecula, California, who owns an auto repair
 15 shop and rental properties.¹¹³⁷ Mr. Goldstein testified that he has known Mr. Wanzek for approximately
 16 32 years, during which time Mr. Wanzek has been his accountant.¹¹³⁸ Mr. Goldstein testified that his
 17 opinion of Mr. Wanzek’s character is “very good” based on having done business with Mr. Wanzek
 18 for over 30 years.¹¹³⁹ Mr. Goldstein testified that he was not aware of the California order against Mr.
 19 Wanzek prior to receiving a copy from counsel before the hearing.¹¹⁴⁰

20 ...

21 ...

22

23 ¹¹²⁹ Tr. at 2214.

¹¹³⁰ Tr. at 2222.

24 ¹¹³¹ Tr. at 2222.

¹¹³² Tr. at 2230.

25 ¹¹³³ Tr. at 2223-2224.

¹¹³⁴ Tr. at 2225-2226.

26 ¹¹³⁵ Tr. at 2228-2229.

¹¹³⁶ Tr. at 2224-2225, 2236.

¹¹³⁷ Tr. at 2239.

27 ¹¹³⁸ Tr. at 2239-2240.

¹¹³⁹ Tr. at 2240.

28 ¹¹⁴⁰ Tr. at 2241-2242.

1 Gary Kollars

2 Mr. Kollars testified that he is a retired resident of Lake Havasu City, Arizona, previously
 3 having worked in insurance.¹¹⁴¹ Mr. Kollars testified that he was an investor in Concordia.¹¹⁴² Mr.
 4 Kollars testified that he has known Mr. Wanzek for approximately 30 years and got to know him as
 5 they have both been active in Kiwanis.¹¹⁴³ Mr. Kollars testified that Mr. Wanzek sold him the
 6 investment in Concordia in November 2006.¹¹⁴⁴ Mr. Kollars testified that he invested \$50,000 in
 7 Concordia.¹¹⁴⁵ Mr. Kollars testified that he understood there were risks when he made the
 8 investment.¹¹⁴⁶ Mr. Kollars testified that he could not recall what Mr. Wanzek told him regarding the
 9 investment's risks, but Mr. Kollars anticipated risk based upon the interest rate, which he equated with
 10 an aggressive fund.¹¹⁴⁷ Mr. Kollars testified that he did not think he ever claimed losses on his tax
 11 returns resulting from his investment in Concordia.¹¹⁴⁸ Mr. Kollars testified that he does not blame
 12 Mr. Wanzek for his losses and that he does not want the State to give him money taken from Mr.
 13 Wanzek or Mr. Bersch.¹¹⁴⁹ When asked about Mr. Wanzek's character, Mr. Kollars testified that he
 14 trusted and believed in Mr. Wanzek and considered him a "good Christian man."¹¹⁵⁰ Mr. Kollars
 15 testified that he was not aware of the California order against Mr. Wanzek prior to receiving a copy
 16 from counsel before the hearing.¹¹⁵¹

17 Mr. Kollars testified that in addition to his investment in Concordia, in 2006 he also had a
 18 401(k) and IRA accounts, real estate investments in the building for his insurance company, and a lot
 19 where he built a car wash.¹¹⁵² Mr. Kollars testified that in 2008, 2009, and 2010, his other investments
 20 suffered: Mr. Kollars had to pay money into the car wash to keep it going and a commercial real estate
 21 fund lost value.¹¹⁵³

22 ¹¹⁴¹ Tr. at 2244.

23 ¹¹⁴² Tr. at 2244.

24 ¹¹⁴³ Tr. at 2244-2245, 2247.

25 ¹¹⁴⁴ Tr. at 2245, 2254.

26 ¹¹⁴⁵ Tr. at 2245.

27 ¹¹⁴⁶ Tr. at 2245-2246.

28 ¹¹⁴⁷ Tr. at 2258-2259.

¹¹⁴⁸ Tr. at 2246.

¹¹⁴⁹ Tr. at 2246-2247.

¹¹⁵⁰ Tr. at 2247.

¹¹⁵¹ Tr. at 2259-2260.

¹¹⁵² Tr. at 2249-2250.

¹¹⁵³ Tr. at 2250-2251.

1 Mr. Kollars testified that he did not recall Mr. Wanzek informing him of Concordia's financial
 2 condition at the time he invested.¹¹⁵⁴ Mr. Kollars testified that Concordia's loss of \$836,000 for the
 3 fiscal year ending December 31, 2006, was information he would have wanted to know as part of his
 4 decision to invest.¹¹⁵⁵ Mr. Kollars testified that he did not recall Mr. Wanzek telling him that Mr.
 5 Wanzek would receive a finder's fee if Mr. Kollars invested in Concordia.¹¹⁵⁶

6 Mr. Kollars testified that he lost approximately \$25,000 on the Concordia investment.¹¹⁵⁷ Mr.
 7 Kollars testified that while he does not want to see money taken away from Mr. Wanzek, he would
 8 abide by a restitution decision made by the Commission.¹¹⁵⁸

9 Mr. Kollars testified that at the time he made his investment in Concordia, his net worth,
 10 excluding his primary residence, would have been less than \$1 million.¹¹⁵⁹ Mr. Kollars testified that at
 11 the time he made his investment in Concordia, his joint annual income with his spouse would have
 12 been less than \$300,000.¹¹⁶⁰ Mr. Kollars testified that at the time he made his investment in Concordia,
 13 Mr. Wanzek would have known Mr. Kollars' annual income because he did Mr. Kollars' taxes.¹¹⁶¹

14 Mildred A. Harris

15 Ms. Harris testified that she currently resides in Flagstaff, Arizona, but had lived in Lake
 16 Havasu City for 44 years.¹¹⁶² Ms. Harris testified that she is retired, having formerly owned a
 17 construction business with her husband in Michigan that they moved to Lake Havasu City in 1974.¹¹⁶³
 18 Ms. Harris testified that she invested in Concordia in 1999 after meeting with Ken Crowder in Mr.
 19 Bersch's office.¹¹⁶⁴ Ms. Harris testified that her understanding of the investment was that Concordia
 20 was financing semi-truck tractors with the titles to be held in Lake Havasu City, Arizona, by Mr. Bersch
 21 and Mr. Wanzek, where the investor could collect on the truck if there was a default on the loan.¹¹⁶⁵

22
 23 ¹¹⁵⁴ Tr. at 2254.

24 ¹¹⁵⁵ Tr. at 2254-2255.

25 ¹¹⁵⁶ Tr. at 2255.

26 ¹¹⁵⁷ Tr. at 2256.

27 ¹¹⁵⁸ Tr. at 2256-2258.

28 ¹¹⁵⁹ Tr. at 2261.

¹¹⁶⁰ Tr. at 2261-2262.

¹¹⁶¹ Tr. at 2262.

¹¹⁶² Tr. at 2266.

¹¹⁶³ Tr. at 2266-2267.

¹¹⁶⁴ Tr. at 2267-2268, 2272, 2274-2275.

¹¹⁶⁵ Tr. at 2269, 2275.

1 Ms. Harris testified that she did not think she had given permission for Mr. Bersch and Mr. Wanzek to
2 send the truck titles back to Concordia.¹¹⁶⁶

3 Ms. Harris testified that she initially invested \$150,000 and later invested another \$18,000.¹¹⁶⁷
4 Ms. Harris testified that she received monthly interest payments from 1999 through about 2009, then
5 payments designated as return of principal from 2009 through 2012 or 2013.¹¹⁶⁸ Ms. Harris testified
6 that she had been claiming losses from the Concordia investment on her tax returns.¹¹⁶⁹

7 Ms. Harris testified that she does not blame Mr. Wanzek or Mr. Bersch for her losses and that
8 she does not want the State to give her money taken from Mr. Wanzek or Mr. Bersch.¹¹⁷⁰ Ms. Harris
9 testified that she has known Mr. Bersch for approximately 20 years.¹¹⁷¹ Ms. Harris testified that her
10 opinion of Mr. Bersch's character was excellent and that he has participated in fundraising for the
11 Humane Society, Mohave Community College, and other organizations.¹¹⁷² Ms. Harris testified that
12 her opinion of Mr. Wanzek's character was also excellent and that he has done a "really nice job"
13 taking care of a large family including adopted children.¹¹⁷³

14 Ms. Harris testified that at the time she made her initial investment, her net worth, not including
15 her primary residence, was greater than \$1 million.¹¹⁷⁴ Ms. Harris testified that at the time she made
16 her initial investment, her combined annual income with her spouse would have been less than
17 \$300,000.¹¹⁷⁵ Ms. Harris testified that she could not recall whether Mr. Bersch, Mr. Wanzek or Ken
18 Crowder had asked about her net worth or annual income prior to her investing in Concordia.¹¹⁷⁶ Ms.
19 Harris testified that Mr. Bersch might have known her annual income or net worth as she would have
20 him review tax returns that she prepared on her own behalf.¹¹⁷⁷

21 ...

23 ¹¹⁶⁶ Tr. at 2275.

24 ¹¹⁶⁷ Tr. at 2268.

25 ¹¹⁶⁸ Tr. at 2268, 2272-2273.

26 ¹¹⁶⁹ Tr. at 2269.

27 ¹¹⁷⁰ Tr. at 2269-2270.

28 ¹¹⁷¹ Tr. at 2270.

¹¹⁷² Tr. at 2271.

¹¹⁷³ Tr. at 2271-2272.

¹¹⁷⁴ Tr. at 2276.

¹¹⁷⁵ Tr. at 2276.

¹¹⁷⁶ Tr. at 2276-2277.

¹¹⁷⁷ Tr. at 2277.

Keith Roberts

Mr. Roberts testified that he lives in Lake Havasu City, Arizona, where he runs a veterinary clinic.¹¹⁷⁸ Mr. Roberts testified that he invested in Concordia after a recommendation from Mr. Wanzek and that he did not meet with anyone else.¹¹⁷⁹ Mr. Roberts testified that he made an initial investment in Concordia of \$25,000 on September 27, 1999, and a second investment of \$25,000 in February 2003.¹¹⁸⁰ Mr. Roberts testified that he understood the investment as Concordia financing truck purchases and holding titles to the trucks, which backed the investment.¹¹⁸¹ Mr. Roberts testified that the investment sounded good to him because of the high interest rate.¹¹⁸² Mr. Roberts testified that he had some losses from his investment in Concordia which he claimed on his tax return.¹¹⁸³ Mr. Roberts testified that he does not blame Mr. Wanzek or Mr. Bersch for his losses and that he does not want the State to give him money taken from Mr. Wanzek or Mr. Bersch.¹¹⁸⁴

Mr. Roberts testified that he has known Mr. Wanzek for approximately 20 years, since meeting Mr. Wanzek in Rotary, that they are acquaintances who occasionally played racquetball, and that Mr. Wanzek did Mr. Roberts' accounting work.¹¹⁸⁵ Mr. Roberts testified that, in his opinion, Mr. Wanzek is an exceptional person whom Mr. Roberts trusts.¹¹⁸⁶ Mr. Roberts testified that all investments have risks and that he discussed risks with Mr. Wanzek, although he could not recall any specific risks mentioned by Mr. Wanzek.¹¹⁸⁷ Mr. Roberts testified that Mr. Wanzek told him that he could get his investment back, but that it would take a few weeks or a month, as opposed to the liquidity of a bank account.¹¹⁸⁸ Mr. Roberts testified that Mr. Wanzek disclosed that he would receive a finder's fee if Mr. Roberts invested.¹¹⁸⁹ Mr. Roberts testified that he understood Concordia would hold the truck titles.¹¹⁹⁰

¹¹⁷⁸ Tr. at 2280.¹¹⁷⁹ Tr. at 2280, 2283-2284, 2289.¹¹⁸⁰ Tr. at 2280.¹¹⁸¹ Tr. at 2281, 2285.¹¹⁸² Tr. at 2285.¹¹⁸³ Tr. at 2281.¹¹⁸⁴ Tr. at 2281-2282.¹¹⁸⁵ Tr. at 2282.¹¹⁸⁶ Tr. at 2282.¹¹⁸⁷ Tr. at 2281, 2284.¹¹⁸⁸ Tr. at 2285.¹¹⁸⁹ Tr. at 2285.¹¹⁹⁰ Tr. at 2286.

1 Mr. Roberts testified that his net worth would have been just about \$1 million at the time of his
 2 first investment and over \$1 million at the time of his second investment.¹¹⁹¹ Mr. Roberts testified that
 3 his joint income with his spouse was “maybe” a little over \$300,000 at the time of his first investment
 4 and “definitely” over \$300,000 at the time of his second investment.¹¹⁹² Mr. Roberts testified that at
 5 the time of his investments, Mr. Wanzek would have had a basis to know both Mr. Roberts’ net worth
 6 and annual income because Mr. Wanzek was his accountant.¹¹⁹³

7 Bryan Neil Peters

8 Mr. Peters testified that he resides in Lake Havasu City, Arizona, where he is a real estate
 9 investor.¹¹⁹⁴ Mr. Peters testified that he has known Mr. Wanzek, as well as his wife and her family, for
 10 over thirty years and that Mr. Peters had been aware of the Concordia investment for some time.¹¹⁹⁵
 11 Mr. Peters testified that he initially invested \$200,000 in Concordia in December 2005, and then
 12 invested another \$100,000 sometime in 2006.¹¹⁹⁶ Mr. Peters testified that he could not recall Mr.
 13 Wanzek showing him a PowerPoint or flow chart about Concordia prior to Mr. Peters’ investment.¹¹⁹⁷
 14 Mr. Peters testified that he could not recall specifically what Mr. Wanzek said regarding the safety of
 15 the investment.¹¹⁹⁸ Mr. Peters testified that he could not recall Mr. Wanzek stating anything negative
 16 about the financial condition of Concordia prior to Mr. Peters making his second investment.¹¹⁹⁹ Mr.
 17 Peters testified that he gave his initial check for the Concordia investment to Mr. Wanzek.¹²⁰⁰ Mr.
 18 Peters testified that he received monthly interest payments from when he invested through 2009, at
 19 which time he started receiving monthly payments designated as repayment of principal.¹²⁰¹ Mr. Peters
 20 testified that he was fairly comfortable with the Concordia investment but that he knew there were risks
 21 with everything.¹²⁰²

22
 23 ¹¹⁹¹ Tr. at 2287.

24 ¹¹⁹² Tr. at 2287-2288.

25 ¹¹⁹³ Tr. at 2288.

26 ¹¹⁹⁴ Tr. at 2292, 2295-2297.

27 ¹¹⁹⁵ Tr. at 2292-2294.

28 ¹¹⁹⁶ Tr. at 2292-2293, 2301-2302, 2307.

¹¹⁹⁷ Tr. at 2298.

¹¹⁹⁸ Tr. at 2299.

¹¹⁹⁹ Tr. at 2302.

¹²⁰⁰ Tr. at 2297-2298.

¹²⁰¹ Tr. at 2293.

¹²⁰² Tr. at 2293.

1 Mr. Peters testified that he lost approximately \$60,000 on the investment.¹²⁰³ Mr. Peters
 2 testified that he claimed losses from his Concordia investment on his tax returns.¹²⁰⁴ Mr. Peters testified
 3 that he does not blame Mr. Wanzek for his losses and that he does not want the State to give him money
 4 taken from Mr. Wanzek or Mr. Bersch.¹²⁰⁵ Mr. Peters testified that if the Commission were to find the
 5 investment was sold in violation of the Act, he would want Concordia to pay restitution to him.¹²⁰⁶

6 Mr. Peters testified that his opinion of Mr. Wanzek's character is that he is honest, trustworthy
 7 and a good friend.¹²⁰⁷ Mr. Peters testified that he was not aware of the California order against Mr.
 8 Wanzek prior to receiving a copy from counsel before the hearing.¹²⁰⁸

9 Mr. Peters testified that he understood that the truck titles would be held by Mr. Wanzek and
 10 that they would be replaced with other titles by Concordia if there was a problem.¹²⁰⁹ Mr. Peters
 11 testified that he did not recall any conversation with Mr. Wanzek about sending the titles back to
 12 Concordia.¹²¹⁰ Mr. Peters testified that he initially understood that if he needed his investment back, it
 13 could be returned in a couple weeks, but after he received a notice from Concordia, that original
 14 understanding was no longer the case.¹²¹¹ Mr. Peters testified that he understood that Mr. Wanzek
 15 would receive a finder's fee if Mr. Peters invested in Concordia.¹²¹²

16 Mr. Peters testified that, at the time of his investments, his net worth would have been about \$1
 17 million and his joint income with his spouse was under \$300,000.¹²¹³ Mr. Peters testified that, at the
 18 time of his investments, Mr. Wanzek would have had a basis to know both Mr. Peters' net worth and
 19 annual income because Mr. Wanzek was his accountant.¹²¹⁴

20 . . .

21 . . .

23 ¹²⁰³ Tr. at 2303.

¹²⁰⁴ Tr. at 2294.

24 ¹²⁰⁵ Tr. at 2294.

¹²⁰⁶ Tr. at 2303.

25 ¹²⁰⁷ Tr. at 2295.

¹²⁰⁸ Tr. at 2304.

26 ¹²⁰⁹ Tr. at 2300.

¹²¹⁰ Tr. at 2300.

27 ¹²¹¹ Tr. at 2300-2301.

¹²¹² Tr. at 2303.

¹²¹³ Tr. at 2305.

28 ¹²¹⁴ Tr. at 2305-2306.

Randall Johnson

Mr. Johnson testified that he is a plumber residing in Lake Havasu City, Arizona.¹²¹⁵ Mr. Johnson testified that he has known Mr. Wanzek for over 20 years.¹²¹⁶ Mr. Johnson testified that he met Mr. Wanzek playing softball, and that Mr. Wanzek has been Mr. Johnson's tax accountant and friend for several years.¹²¹⁷ Mr. Johnson testified that he thinks highly of Mr. Wanzek and that people in the community have positive impressions of Mr. Wanzek.¹²¹⁸

Mr. Johnson testified that he did not invest in Concordia and that Mr. Wanzek never discussed with Mr. Johnson his potentially investing in Concordia.¹²¹⁹

Julie Wilson

Ms. Wilson testified that she is a resident of Lake Havasu City, Arizona, employed in payroll processing.¹²²⁰ Ms. Wilson testified that Mr. Wanzek is her brother-in-law and that she has known him for 38 years.¹²²¹ Ms. Wilson testified that she considers Mr. Wanzek to be a "very honest, kind, and caring person."¹²²² Ms. Wilson testified that Mr. Wanzek is active in fundraising with his church and for charities such as Rotary, Toys for Tots and Noah's Light Foundation, which is seeking a cure for pediatric cancer.¹²²³ Ms. Wilson testified that Mr. Wanzek knows many people in the community and that he is well-liked.¹²²⁴ Ms. Wilson testified that she was not aware of the California order against Mr. Wanzek prior to receiving a copy from counsel before the hearing.¹²²⁵

Cindy Medina

Ms. Medina testified that she is an accountant, currently employed as an Enrolled Agent, residing in Lake Havasu City, Arizona.¹²²⁶ Ms. Medina testified that Mr. Bersch is a friend of her brother, and she has known him since 2005.¹²²⁷ Ms. Medina testified that Mr. Bersch supported her

¹²¹⁵ Tr. at 2318.¹²¹⁶ Tr. at 2318.¹²¹⁷ Tr. at 2318.¹²¹⁸ Tr. at 2319.¹²¹⁹ Tr. at 2320.¹²²⁰ Tr. at 2323.¹²²¹ Tr. at 2323.¹²²² Tr. at 2323.¹²²³ Tr. at 2323-2324.¹²²⁴ Tr. at 2324.¹²²⁵ Tr. at 2325-2326.¹²²⁶ Tr. at 2328.¹²²⁷ Tr. at 2328.

1 return to school to become an accountant and that she has worked with Mr. Bersch since 2008.¹²²⁸ Ms.
 2 Medina testified that she owns a company and subcontracts work to Mr. Besch as she is not a CPA.¹²²⁹
 3 Ms. Medina testified that she thinks Mr. Bersch “is a very honorable person with the utmost
 4 integrity.”¹²³⁰ Ms. Medina testified that she has seen Mr. Bersch send away clients who sought to do
 5 things that were dishonest.¹²³¹ Ms. Medina testified that Mr. Bersch fundraises for several non-profits
 6 in the community.¹²³² Ms. Medina testified that she believes most people in the Lake Havasu
 7 community “have the utmost respect” for Mr. Bersch.¹²³³ Ms. Medina testified that she was not aware
 8 of the California order against Mr. Bersch prior to receiving a copy from counsel before the hearing.¹²³⁴

9 Armen Dekmejian

10 Mr. Dekmejian testified that he has an M.B.A. in finance and accounting and that he has been
 11 working in business and finance for 30 years, currently working as a member of Pacific Financial
 12 Advisors (“PFA”) in corporate advisory.¹²³⁵ Mr. Dekmejian testified that he first started working with
 13 Concordia in 2004, through PFA.¹²³⁶ Mr. Dekmejian testified that in 2004, Concordia was a healthy,
 14 growing company and he worked with Ken Crowder, Concordia’s CEO and chairman.¹²³⁷ Mr.
 15 Dekmejian testified that at the time, Southern California would have been “the truck hauling capital of
 16 North America” with the two largest ports, although trucking would be impacted by the economy of
 17 Southern California.¹²³⁸

18 Mr. Dekmejian testified that in conducting due diligence of Concordia, he worked mostly with
 19 Chris Crowder, who sought to move away from individual lending, an expensive source of funding for
 20 Concordia, toward bringing in institutional financing.¹²³⁹ Mr. Dekmejian testified that based upon his
 21

22 ¹²²⁸ Tr. at 2328-2329.

23 ¹²²⁹ Tr. at 2330-2331.

24 ¹²³⁰ Tr. at 2329.

25 ¹²³¹ Tr. at 2329.

26 ¹²³² Tr. at 2329.

27 ¹²³³ Tr. at 2330.

28 ¹²³⁴ Tr. at 2331.

¹²³⁵ Tr. at 2355-2356.

¹²³⁶ Tr. at 2357, 2491. Mr. Dekmejian acknowledged that in an examination under oath held on April 30, 2013, Mr. Dekmejian had testified that at the time he had been a consultant for Concordia for six or seven years. Tr. at 2491-2492; Exh. S-164 at ACC011815.

¹²³⁷ Tr. at 2357-2358.

¹²³⁸ Tr. at 2358.

¹²³⁹ Tr. at 2359-2360, 2472-2473.

1 work with Concordia and review of the company, including documents going back to the 1990s, Mr.
 2 Dekmejian believed that Concordia was successful and profitable for several years.¹²⁴⁰ Mr. Dekmejian
 3 testified that during the 1990s and early 2000s, Concordia made payment on principal without fail and
 4 paid interest to investors, many of whom made more money than they invested.¹²⁴¹

5 Mr. Dekmejian testified that in 2005, Concordia had revenue of \$7.1 million and operating cash
 6 flow of \$1,075,000.¹²⁴² Mr. Dekmejian testified that Concordia had an operating profit of \$1.1 million
 7 for the first six months of 2006, and \$2.2 million for 2006 as a whole.¹²⁴³ Mr. Dekmejian testified that
 8 net income as a means of determining the health of a company is “not a solid cash number to look at”
 9 as it reflects noncash expenses and could reflect a tax benefit.¹²⁴⁴ Mr. Dekmejian testified that it is
 10 more customary to analyze a company by looking at operating cash flow which removes the noncash
 11 items.¹²⁴⁵ Mr. Dekmejian testified that Concordia recorded net income (or loss) as follows: (\$836,186)
 12 in 2006,¹²⁴⁶ (\$1,055,451) in 2007,¹²⁴⁷ (\$2,252,777) in 2008,¹²⁴⁸ (\$4,423,362) in 2009,¹²⁴⁹ (\$4,011,597)
 13 in 2010,¹²⁵⁰ \$3,754 in 2011,¹²⁵¹ \$80,611 in 2012,¹²⁵² (\$119,893) in 2013,¹²⁵³ and (\$1,257,626) in
 14 2014.¹²⁵⁴

15 Mr. Dekmejian testified that Concordia was still looking to expand in the second half of
 16 2006.¹²⁵⁵ Mr. Dekmejian testified that Concordia was expanding its operations, relocating to a larger
 17 office space, upgrading its software system, and hiring new staff.¹²⁵⁶ Mr. Dekmejian testified that for
 18 a period of four or five months, Concordia was paying double rent as the company had half its staff in
 19 each location to ensure no interruption in collections and allow a seamless switch from one location to

20 ¹²⁴⁰ Tr. at 2360-2361.

21 ¹²⁴¹ Tr. at 2361-2362.

22 ¹²⁴² Tr. at 2363.

23 ¹²⁴³ Tr. at 2363.

24 ¹²⁴⁴ Tr. at 2363-2364.

25 ¹²⁴⁵ Tr. at 2364.

26 ¹²⁴⁶ Tr. at 2502; Exh. ER-2 at C000122.

27 ¹²⁴⁷ Tr. at 2504-2505; Exh. ER-2 at C000134.

28 ¹²⁴⁸ Tr. at 2505; Exh. ER-2 at C000053, C000134.

¹²⁴⁹ Tr. at 2510; Exh. ER-2 at C000141.

¹²⁵⁰ Tr. at 2511; Exh. ER-2 at C000141.

¹²⁵¹ Tr. at 2513-2514; Exh. ER-2 at C000159.

¹²⁵² Tr. at 2514; Exh. ER-2 at C000055.

¹²⁵³ Tr. at 2515; Exh. ER-2 at C000056.

¹²⁵⁴ Tr. at 2516; Exh. ER-2 at C000164.

¹²⁵⁵ Tr. at 2365.

¹²⁵⁶ Tr. at 2365-2366.

1 the next.¹²⁵⁷ Mr. Dekmejian testified that the new software system required setup fees and then charges
 2 for conversion of the data from the old system, which cost a total of between \$75,000 to \$90,000 plus
 3 ongoing monthly fees and modifications.¹²⁵⁸ Mr. Dekmejian testified that after 2008, the old
 4 accounting system was unavailable, leaving only printed payment information available from investor
 5 files, which were missing some of the interest payments.¹²⁵⁹

6 Mr. Dekmejian testified that Concordia spoke with several investment firms about its expansion
 7 in 2006 and 2007, narrowing the field to one, Fortress, which led to a preliminary term sheet of five or
 8 six-year financing of \$50 million at a rate of return 3.75% above the London Interbank Offered Rate.¹²⁶⁰
 9 Mr. Dekmejian testified that the financing closing was pushed back a bit because Fortress wanted data
 10 that the current Concordia software system did not provide.¹²⁶¹ Mr. Dekmejian testified that once
 11 Concordia reconvened with Fortress, Concordia had seen a slight rise in the delinquency rate of its loan
 12 pools, which caused Fortress to seek changes to the terms, and caused Concordia to table the
 13 discussions.¹²⁶²

14 Mr. Dekmejian testified that diesel fuel prices rose in 2007 and early 2008.¹²⁶³ Mr. Dekmejian
 15 testified that with the economic crisis in 2008, haul rates declined while truckers' costs increased,
 16 leaving them unable to service their debt.¹²⁶⁴ Mr. Dekmejian testified that the increase in delinquencies
 17 led to an increase in gross losses and repossessions for Concordia.¹²⁶⁵ Mr. Dekmejian testified that
 18 Concordia had 270 repossessions in 2008, representing 20 to 25 percent of its loans.¹²⁶⁶ Mr. Dekmejian
 19 testified that delinquencies increased significantly in 2009, and the First Amendment of the Servicing
 20 Agreement was issued in February 2009.¹²⁶⁷ Mr. Dekmejian testified that Concordia had normally
 21 received 40 to 50 cents on the dollar from repossessions but two large competitors filed bankruptcy
 22 and a third exited the lending industry, which led to a large number of additional repossessions that

23 ¹²⁵⁷ Tr. at 2366.

24 ¹²⁵⁸ Tr. at 2367.

25 ¹²⁵⁹ Tr. at 2368-2369.

26 ¹²⁶⁰ Tr. at 2369-2372.

27 ¹²⁶¹ Tr. at 2373-2374.

28 ¹²⁶² Tr. at 2374-2375.

¹²⁶³ Tr. at 2379-2381; Exh. C-20.

¹²⁶⁴ Tr. at 2381.

¹²⁶⁵ Tr. at 2382.

¹²⁶⁶ Tr. at 2382.

¹²⁶⁷ Tr. at 2383; Exh. C-10.

1 reduced returns to 15 to 20 cents on the dollar for repossessions at auctions throughout the United
 2 States.¹²⁶⁸ Mr. Dekmejian testified that a competitor going out of business is a good thing if the
 3 competitor does not have inventory, otherwise it results in a tough time when that inventory hits the
 4 market.¹²⁶⁹ Mr. Dekmejian testified that at the time of the First Amendment, PFA was working with
 5 Concordia to cut costs, stabilize operations, downsize, reduce the origination of new loans, and
 6 reevaluate the underwriting process.¹²⁷⁰ Mr. Dekmejian testified that the First Amendment was issued
 7 to avoid bankruptcy, which was unattractive at the time because there were no buyers for liquidations
 8 and there were too many uncertainties over the severity and duration of the financial crisis.¹²⁷¹ Mr.
 9 Dekmejian testified that Ken and Chris Crowder also wanted to keep making monthly payments to the
 10 investors, which would have stopped if Concordia filed for bankruptcy.¹²⁷² Mr. Dekmejian testified
 11 that the First Amendment “resulted in getting a significant number of consecutive uninterrupted
 12 payments to investors on a monthly basis.”¹²⁷³ Mr. Dekmejian testified that the monthly payments
 13 after the First Amendment were recharacterized from interest to return of principal.¹²⁷⁴

14 Mr. Dekmejian testified that things got worse after the First Amendment with delinquency rates
 15 continuing to rise and the recession affecting financial markets.¹²⁷⁵ Mr. Dekmejian testified that
 16 Concordia was sending out quarterly newsletters containing financial information to investors in late
 17 2009, continuing until all investors were paid off in approximately August or September 2013.¹²⁷⁶

18 Mr. Dekmejian testified that Concordia was reducing fees that it paid from 2011 through
 19 2013.¹²⁷⁷ Mr. Dekmejian testified that Concordia also reduced staff from more than 25 in 2009 to 5
 20 plus consultants at the time of the hearing.¹²⁷⁸ Mr. Dekmejian testified that from 2009 through 2011,
 21 PFA was trying to find new companies for whom Concordia could perform work such as loan servicing
 22

23 ¹²⁶⁸ Tr. at 2385-2386.

24 ¹²⁶⁹ Tr. at 2386.

25 ¹²⁷⁰ Tr. at 2387, 2394-2397; Exh. C-29.

26 ¹²⁷¹ Tr. at 2388-2389.

27 ¹²⁷² Tr. at 2389-2391.

28 ¹²⁷³ Tr. at 2391.

¹²⁷⁴ Tr. at 2487-2488.

¹²⁷⁵ Tr. at 2391-2392.

¹²⁷⁶ Tr. at 2392-2394.

¹²⁷⁷ Tr. at 2522.

¹²⁷⁸ Tr. at 2522-2523.

1 or servicing asset classes for hedge funds.¹²⁷⁹ Mr. Dekmejian testified that even after implementing
 2 cost cutting measures, Concordia could not continue to pay investors on a monthly basis.¹²⁸⁰ Mr.
 3 Dekmejian testified that Concordia considered bankruptcy and a letter was sent to investors seeking
 4 their input.¹²⁸¹ Mr. Dekmejian testified that there was a risk that Concordia might not come out of a
 5 bankruptcy and that investors would likely recover less than 30% of their funds after at least two
 6 years.¹²⁸² Mr. Dekmejian testified that the Second Amendment, which would return 45% of principal
 7 to investors, was a better option than bankruptcy.¹²⁸³ Mr. Dekmejian testified that Concordia calculated
 8 the principal balance based upon the date of the First Amendment, which was favorable to investors.¹²⁸⁴

9 Mr. Dekmejian testified that most investors made money with Concordia and that Concordia
 10 paid out more money than it brought in from investors.¹²⁸⁵ Mr. Dekmejian testified that the amount
 11 repaid to investors was over \$30 million, which was understated in the Division's documents by not
 12 including interest paid from 1998 through 2003.¹²⁸⁶ Mr. Dekmejian testified that his information
 13 regarding these interest payments came from audited financials for those years plus due diligence
 14 conducted by Fortress and other investment firms in 2006.¹²⁸⁷ Mr. Dekmejian testified that if the
 15 Second Amendment's reduction of principal was taken into account, the amount owed to investors
 16 would be zero.¹²⁸⁸ Mr. Dekmejian testified that he created a summary from his review of every
 17 Concordia investor account using information from the accounting ledgers which dated back to
 18 December 2006, and hard files for the individual investors prior to 2006.¹²⁸⁹ Mr. Dekmejian testified
 19 that his summary was created to correct errors in the Division's own summary, a number of which the
 20 Division agreed with.¹²⁹⁰ Mr. Dekmejian testified that several of the Division's errors went
 21 uncorrected: accounts were missing interest that was paid prior to the new software system in December
 22

23 ¹²⁷⁹ Tr. at 2523-2524.

24 ¹²⁸⁰ Tr. at 2395.

25 ¹²⁸¹ Tr. at 2397-2398.

26 ¹²⁸² Tr. at 2399.

27 ¹²⁸³ Tr. at 2405, 2448.

28 ¹²⁸⁴ Tr. at 2405-2406.

¹²⁸⁵ Tr. at 2408-2409; Exh. S-194.

¹²⁸⁶ Tr. at 2409, 2456, 2465; Exh. S-194.

¹²⁸⁷ Tr. at 2470.

¹²⁸⁸ Tr. at 2457-2458.

¹²⁸⁹ Tr. at 2410-2411; Exh. C-24.

¹²⁹⁰ Tr. at 2423-2424.

2016 or paid prior to schedules being incorporated in the files; accounts missed or understated return payments of principal; losses were not offset for investors with multiple accounts; some investment accounts were combined when they should have been segregated; in one case, an investor passed away and the individual's interest payments were not reflected in the two accounts created for the investor's beneficiaries.¹²⁹¹ Mr. Dekmejian testified specifically about Division errors regarding the following accounts: the Canterbury account was not credited for all interest and no money is owed on the original principal;¹²⁹² the two accounts for the Hodels failed to include interest received prior to December 2006, and no money is owed on the original principal;¹²⁹³ the accounts of MaryAnn Lewis and the Newberry Trust failed to reflect all interest payments, missing those payments prior to December 2006 and possibly others;¹²⁹⁴ the Division included accounts for insiders Gregory Farmer and Kris Bersch, the Caputos (whose account was created from a transfer out of an ER Financial account), and Lisa Fuhrman;¹²⁹⁵ the Division failed to offset the account of Jack Guest for a payment he received in excess of the principal on a second account for the Guest Charitable Trust;¹²⁹⁶ and an initial Gayle account was closed and divided equally between a second Gayle account and a Caputo account but the Division did not offset either of the new accounts for payments made on the original Gayle account.¹²⁹⁷ Mr. Dekmejian testified that his summary contained inaccuracies as to some investor accounts: the account for William and Barbara Anderson listed the wrong account number, reflected a deposit and repayment of \$50,000 which should properly have been attributed to an account of Nancy Anderson, and incorrectly reduced the Division's calculation of total investment by \$57,000; and the account for Theresa Patricola incorrectly reduced the Division's calculation of her total investment by \$50,000.¹²⁹⁸

Mr. Dekmejian testified that about 35 to 40 percent of Concordia investors lost money.¹²⁹⁹ Mr. Dekmejian testified that at the same time Concordia's noteholders were suffering losses, the widely traded high yield bond ETF did not perform well during the financial crisis of 2008 and 2009 and

¹²⁹¹ Tr. at 2425-2426.

¹²⁹² Tr. at 2426-2430; Exhs. S-194, C-24, C-27 at C000754-C00756, C-28 at C001273-C001276.

¹²⁹³ Tr. at 2430-2433; Exhs. S-194, C-24, C-27 at C000856-C00858, C001209-C001211, C-28 at C001562-C001602.

¹²⁹⁴ Tr. at 2433-2434.

¹²⁹⁵ Tr. at 2434-2438, 2487; Exhs. S-194, C-27 at C000935, C001090.

¹²⁹⁶ Tr. at 2438-2440; Exhs. S-194, C-24.

¹²⁹⁷ Tr. at 2425-2426, 2440-2443; Exhs. S-194, C-27 at C000954-C000955, C001092, C001094.

¹²⁹⁸ Tr. at 2415-2418, 2420-2421; Exhs. S-194, C-24.

¹²⁹⁹ Tr. at 2443.

1 subsequent recession.¹³⁰⁰ Mr. Dekmejian testified that the S&P 500 similarly suffered losses at this
 2 time, although it recovered faster, in part because some companies in the S&P 500 would have been
 3 replaced after they were liquidated or went bankrupt.¹³⁰¹ Mr. Dekmejian testified that investors in the
 4 S&P 500 would have suffered losses of at least 15 to 20 percent in the great recession while a majority
 5 of Concordia investors would have done better, even a good portion of those who lost money.¹³⁰²

6 Mr. Dekmejian testified that the Second Amendment was intended to return more money than
 7 bankruptcy could achieve.¹³⁰³ Mr. Dekmejian testified that, at the time of the hearing, Concordia was
 8 losing about \$5,000 per month from an operating cash flow basis, not including legal expenses
 9 associated with this proceeding.¹³⁰⁴ Mr. Dekmejian testified that Concordia cannot afford to pay back
 10 additional investor principal without seeking bankruptcy protection.¹³⁰⁵ Mr. Dekmejian testified that
 11 Concordia's loan pool is a private debt portfolio of subprime debt from used trucks, currently at about
 12 \$2.45 million, that is small, illiquid, labor intensive to manage and monetize, and declining by about
 13 \$20,000 each month.¹³⁰⁶ Mr. Dekmejian testified that a finding of registration violations would taint
 14 the loan pool, lowering the liquidation price.¹³⁰⁷ Mr. Dekmejian testified that the loan portfolio would
 15 likely sell for no more than 25 to 35 cents on the dollar.¹³⁰⁸ Mr. Dekmejian testified that after a sale,
 16 investors would have a subordinate ranking of claims in a bankruptcy proceeding and that they would
 17 receive de minimis moneys.¹³⁰⁹ Mr. Dekmejian testified that he and Chris Crowder performed an
 18 analysis that determined Concordia could redirect approximately \$75,000 for restitution or penalties
 19 should a ruling be issued by the Commission against Concordia.¹³¹⁰

20 Mr. Dekmejian testified that he understood truck titles were pledged to individual investors'
 21 accounts and ER Financial's role as Custodian was to hold performing accounts for investors and send
 22

23 ¹³⁰⁰ Tr. at 2444-2445; Exh. C-18.

24 ¹³⁰¹ Tr. at 2445-2447; Exh. C-19.

¹³⁰² Tr. at 2447-2448.

25 ¹³⁰³ Tr. at 2448.

¹³⁰⁴ Tr. at 2449.

26 ¹³⁰⁵ Tr. at 2448, 2450.

¹³⁰⁶ Tr. at 2449-2451.

27 ¹³⁰⁷ Tr. at 2451.

¹³⁰⁸ Tr. at 2452.

¹³⁰⁹ Tr. at 2452-2454.

28 ¹³¹⁰ Tr. at 2454.

1 back delinquent accounts to Concordia to be replaced.¹³¹¹ Mr. Dekmejian testified that Concordia, ER
 2 Financial and Mr. Wanzek agreed that custodial fees would be waived beginning in November 2008,
 3 as Concordia was starting to struggle with increased delinquency rates and repossession rates.¹³¹² Mr.
 4 Dekmejian testified that in November 2010, ER Financial transferred the custodial duties, and the
 5 investors' collateral, to Concordia.¹³¹³ Mr. Dekmejian testified that a letter was sent to investors
 6 notifying them about the change in Custodian, but he was not sure when the letter was sent.¹³¹⁴ Mr.
 7 Dekmejian testified that Ms. Patricola made a \$50,000 investment in Concordia in November 2008.¹³¹⁵
 8 Mr. Dekmejian testified that others invested in Concordia in November 2008, but they were given
 9 payouts returning their money, which was not accepted as an investment.¹³¹⁶

10 Mr. Dekmejian testified that by November 2012, there were approximately 300 performing
 11 truck contracts in Concordia's portfolio, some of which would have been from 2008 and, therefore,
 12 acquired with investor money.¹³¹⁷ Mr. Dekmejian testified that at its peak in 2006 or 2007, Concordia
 13 would have had more than 1200 performing truck contracts.¹³¹⁸

14 Mr. Dekmejian testified that in July 2010, he was involved in preliminary discussions looking
 15 to raise a new fund, Concordia Funding, for which Concordia would be the originator and servicer.¹³¹⁹
 16 Mr. Dekmejian testified that Concordia Funding was to be an LLC and would involve institutional
 17 investors who would become members of the LLC.¹³²⁰

18 Mr. Dekmejian testified that in 2009, truck loans originating prior to Concordia's credit
 19 enhancement in early 2009 were not performing well and had 40 percent delinquencies.¹³²¹ Mr.
 20 Dekmejian testified that truck loans originating in the second part of 2009 "started performing
 21 significantly well" and in the last few years, at the time of the hearing, delinquency rates have been at
 22

23 ¹³¹¹ Tr. at 2474-2476.

24 ¹³¹² Tr. at 2476-2477; Exh. C-29 at C002034.

¹³¹³ Tr. at 2480; Exh. C-29 at C002034.

25 ¹³¹⁴ Tr. at 2481.

¹³¹⁵ Tr. at 2477.

26 ¹³¹⁶ Tr. at 2477-2478.

¹³¹⁷ Tr. at 2485-2486.

27 ¹³¹⁸ Tr. at 2518.

¹³¹⁹ Tr. at 2493-2494; Exh. ER-15 at ACC011555.

¹³²⁰ Tr. at 2525-2526.

28 ¹³²¹ Tr. at 2496-2497.

1 least below 5 percent, which Mr. Dekmejian would consider stellar for subprime auto.¹³²²

2 Mr. Dekmejian testified that Concordia paid PFA approximately \$150,000 per year from 2004
3 through 2007.¹³²³ Mr. Dekmejian testified that Concordia paid PFA approximately \$315,000 per year
4 from 2008 through 2010.¹³²⁴ Mr. Dekmejian testified that Concordia paid PFA \$350,000 in 2011.¹³²⁵
5 Mr. Dekmejian testified that Concordia paid PFA \$200,000 in 2012.¹³²⁶ Mr. Dekmejian testified that
6 Concordia paid PFA approximately \$117,000 in 2014.¹³²⁷ Mr. Dekmejian testified that his consulting
7 fees were below market rate.¹³²⁸ Mr. Dekmejian testified that net income is the reported income that
8 reflects noncash income and noncash expenses, after tax, and that it does not give the best indication
9 of the cash profit or loss of a company, i.e. the operating profit.¹³²⁹

10 **III. Legal Argument**

11 **A. Respondents' Arguments for Dismissal and/or Sanctions**

12 **1. Statute of Limitations**

13 **a) Argument**

14 The ER Respondents contend that the Commission should adopt a statute of limitations and
15 dismiss the Division's claims, which date as far back as 1998.¹³³⁰ The ER Respondents contend that
16 the Arizona Supreme Court has noted that statutes of limitations promote justice and serve important
17 public purposes: by protecting defendants from stale claims where evidence may have been lost or
18 witnesses' memories faded, by protecting defendants from the economic or psychological insecurity
19 which can arise from ancient obligations, and to protect the courts from being burdened by stale
20 claims.¹³³¹ The ER Respondents further note that the U.S. Supreme Court has similarly stated that
21 statutes of limitations "promote justice by preventing surprises through the revival of claims that have
22 been allowed to slumber until evidence has been lost, memories have faded, and witnesses have
23

24 ¹³²² Tr. at 2497-2498.

¹³²³ Tr. at 2505-2506.

25 ¹³²⁴ Tr. at 2506-2510; Exh. S-164 at ACC011898-ACC011900.

¹³²⁵ Tr. at 2512-2513; Exh. S-164 at ACC011901-ACC011902.

26 ¹³²⁶ Tr. at 2514; Exh. S-164 at ACC011903.

¹³²⁷ Tr. at 2515-2516.

¹³²⁸ Tr. at 2529.

27 ¹³²⁹ Tr. at 2526.

¹³³⁰ Concordia has submitted notice of joinder on this issue. Concordia's Joinder.

28 ¹³³¹ *Ritchie v. Grand Canyon Scenic Rides*, 165 Ariz. 460, 464, 799 P.2d 801, 805 (1990).

1 disappeared . . . provide security and stability to human affairs . . . [and are] vital to the welfare of
2 society.”¹³³²

3 The ER Respondents further contend that the Division’s action relies upon the antiquated
4 doctrine of *nullum tempus occurrit regi* (time does not run against the king). The ER Respondents urge
5 the Commission to reject this doctrine, citing cases where the Arizona Supreme Court has abolished
6 sovereign immunity and similar doctrines.¹³³³ The ER Respondents contend that the concerns
7 addressed by statutes of limitations equally apply to cases brought by bureaucrats. The ER
8 Respondents argue that “royal prerogative is inconsistent with Arizona’s Constitution, which vests
9 sovereignty in the people, not the bureaucracy.”¹³³⁴

10 The ER Respondents further assert that public policy supports applying a statute of limitations.
11 The ER Respondents note that the “Legislature has long recognized the importance to Arizona’s
12 economy of Arizona businesses being able to raise funds,” citing A.R.S. § 44-2051, and contend
13 enforcement actions regarding “the distant past” would chill capital raising efforts.¹³³⁵ The ER
14 Respondents argue that the Division has adopted the position of having no limit on the age of its
15 enforcement actions, thereby placing businesses in perpetual fear of a Division proceeding and
16 requiring permanent retention of records. The ER Respondents note that the SEC is subject to a statute
17 of limitations, as seen in the Supreme Court’s opinions in *Gabelli* and *Kokesh*.¹³³⁶

18 The ER Respondents urge the Commission to adopt a statute of limitations for securities
19 enforcement cases, suggesting the statute of limitations in the Arizona Securities Act for civil court
20 cases, A.R.S. § 44-2004, which allows one year for registration violations and two years for all other

21 ¹³³² *Gabelli v. S.E.C.*, 568 U.S. 442, 448-449, 133 S. Ct. 1216, 1221, 185 L. Ed. 2d 297 (2013).

22 ¹³³³ *Stone v. Arizona Highway Comm’n*, 93 Ariz. 384, 393, 381 P.2d 107, 113 (1963) (abolishing sovereign immunity);
23 *Grimm v. Arizona Bd. of Pardons & Paroles*, 115 Ariz. 260, 266, 564 P.2d 1227, 1233 (1977) (abolishing absolute official
24 immunity), *Freightways, Inc. v. Arizona Corp. Comm’n*, 129 Ariz. 245, 248, 630 P.2d 541, 544 (1981) (permitting estoppel
against the state in some circumstances), and *Valencia Energy Co. v. Arizona Dep’t of Revenue*, 191 Ariz. 565, 576 ¶ 34,
959 P.2d 1256, 1267 (1998) (abolishing rule against applying equitable estoppel in tax matters).

25 ¹³³⁴ ER Respondents Br. at 65, citing Arizona Constitution, Article II, § 2 (“All political power is inherent in the people,
and governments derive their just powers from the consent of the governed, and are established to protect and maintain
individual rights”).

26 ¹³³⁵ ER Respondents Br. at 65. **A.R.S. § 44-2051. Advancement of economic development and capital formation**
27 In order to foster the economic development of this state, the commission, when acting pursuant to this chapter, shall
consider measures, consistent with investor protection, to increase the availability of and access to capital by companies in
28 this state, to lower the cost of such capital and to foster the development in this state of a diverse financial services industry
providing a full range of financial services, including efficient capital markets.

¹³³⁶ *Kokesh v. S.E.C.*, 137 S. Ct. 1635, 198 L. Ed. 2d 86 (2017).

1 alleged violations of the Act. Alternatively, the ER Respondents suggest that the Commission could
2 adopt the seven-year criminal statute of limitations found in A.R.S. § 13-107.

3 The Division contends that the Act does not impose a time limit for the Division to bring an
4 enforcement action. Citing the Arizona Supreme Court for the principle that “[t]he legislature has the
5 exclusive power to declare what the law shall be,” the Division argues that the Commission should
6 reject the notion of imposing a limitations period when the Legislature has not done so.¹³³⁷ The
7 Division contends that imposing a limitations period would usurp the Legislature’s authority to
8 legislate.

9 The Division contends that the absence of a limitations period is consistent with Arizona law
10 and public policy,¹³³⁸ which has consistently recognized the common law doctrine of *nullum tempus*
11 *occurrit regi* (time does not run against the king),¹³³⁹ and that statutes of limitation do not run against
12 the state “unless the Legislature has expressly and definitely declared that they do.”¹³⁴⁰ The *nullum*
13 *tempus* “doctrine is based on the premise that, although time limitations apply to private parties so as
14 to prevent fraudulent, stale claims, time stands still, as it were, for the state because ‘[t]he officers who
15 are charged with the active duty of enforcing [the] rights [of the state] have no personal profit to gain
16 thereby, and therefore no inducement for the bringing of false and unwarranted actions.’”¹³⁴¹

17 The Division contends that *Gabelli* and *Kokesh*, which construed a federal statute of general
18 applicability, 28 U.S.C. § 2462,¹³⁴² should not provide guidance in this case as there is no counterpart
19 in Arizona law. Arizona courts “will give less weight and not necessarily defer to federal case law that
20 construes a parallel federal statute when the state and federal statutory provisions or their underlying
21 policies materially differ.”¹³⁴³ As such, the Division argues that *Gabelli* and *Kokesh* are inapposite
22

23 ¹³³⁷ *State ex rel. Woods v. Block*, 189 Ariz. 269, 275, 942 P.2d 428, 434 (1997) (internal quotation and citation omitted).

24 ¹³³⁸ “We discern public policy from our constitution, statutes, and judicial decisions.” *CSA 13-101 Loop, LLC v. Loop 101, LLC*, 236 Ariz. 410, 412 ¶ 8, 341 P.3d 452, 454 (2014).

25 ¹³³⁹ *City of Phoenix v. Glenayre Elecs., Inc.*, 242 Ariz. 139, 142 ¶ 10, 393 P.3d 919, 922 (2017).

26 ¹³⁴⁰ *City of Bisbee v. Cochise Cty.*, 52 Ariz. 1, 10, 78 P.2d 982, 985 (1938).

27 ¹³⁴¹ *Glenayre Elecs.*, 242 Ariz. at 142 ¶ 10, 393 P.3d at 922 (quoting *City of Bisbee*, 52 Ariz. at 9, 78 P.2d at 985).

28 ¹³⁴² 28 U.S.C. § 2462. **Time for commencing proceedings**

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

¹³⁴³ *Sell v. Gama*, 231 Ariz. 323, 327 ¶ 18, 295 P.3d 421, 425 (2013).

1 here.

2 The Division contends that imposing a limitations period on enforcement actions would
3 undermine the Commission's ability to remedy violations of the Act. The Division contends that a
4 statute of limitations would compress the timeline for the Division to carefully investigate alleged
5 violations, which typically includes steps such as: "(1) reviewing investor complaints, which the
6 Securities Division may not receive until several years after the date of investment; (2) interviewing
7 investors; (3) investigating the business, which may include an undercover investigation that takes
8 months to develop; (4) collecting evidence using document subpoenas and examinations under oath;
9 (5) interacting with the business in an attempt to reach a negotiated resolution; and (6) if necessary,
10 filing an enforcement action."¹³⁴⁴ The Division contends that "since securities violations often extend
11 over several years before they come to light," a limitations period could result in violators responsible
12 only for their most recent conduct, with defrauded investors unable to receive restitution.¹³⁴⁵

13 b) Analysis and Conclusion

14 The Preamble to the Arizona Securities Act reads:

15 The intent and purpose of this Act is for the protection of the public, the
16 preservation of fair and equitable business practices, the suppression of
17 fraudulent or deceptive practices in the sale and purchase of securities,
18 and the prosecution of persons engaged in fraudulent or deceptive
19 practices in the sale or purchase of securities. *This Act shall not be given*
20 *a narrow or restricted interpretation or construction, but shall be*
21 *liberally construed as a remedial measure in order not to defeat the*
22 *purpose thereof.*¹³⁴⁶

23 Arizona courts have consistently acknowledged the Arizona Legislature's directive and given
24 broad effect to the Act for the protection of the public.¹³⁴⁷

25 As stated by the Division, and implied by the arguments of the Respondents, the Arizona

26 ¹³⁴⁴ Division Reply Br. at 55.

27 ¹³⁴⁵ Division Reply Br. at 56.

¹³⁴⁶ 1951 Ariz. Sess. Laws ch. 18, § 20 (emphasis added).

28 ¹³⁴⁷ See *Hirsch v. Arizona Corp. Comm'n*, 237 Ariz. 456, 466 ¶ 40, 352 P.3d 925, 935 (App. 2015); *E. Vanguard Forex, Ltd. v. Arizona Corp. Comm'n*, 206 Ariz. 399, 410 ¶ 36, 79 P.3d 86, 97 (App. 2003).

Securities Act provides no time limit upon the Division for bringing an enforcement action. Respondents request that the Commission apply a statute of limitations to the Division's securities enforcement cases. The doctrine of *nullum tempus occurrit regi* is an exception designed for the public benefit.¹³⁴⁸ As noted by the Division, the imposition of a limitations period could hinder the Division's ability to investigate alleged securities violations and leave investors without an ability to receive restitution. This result is contrary to the Legislature's stated purpose of the Act.

Respondents' other arguments are not persuasive. The United States Supreme Court cases raised by the Respondents, *Gabelli* and *Kokesh*, involve a federal statute for which no parallel provision applies to the Act. While A.R.S. § 44-2051 directs the Commission to consider measures increasing availability of and access to capital for Arizona companies, the statute says that such measures are to be consistent with investor protection. Adoption of a statute of limitations on securities enforcement actions would not be consistent with investor protection. Accordingly, we decline to impose a statute of limitations on securities enforcement actions.

2. Laches

a) Argument

Both Concordia and the ER Respondents argue that the Division's claims should be barred by laches.¹³⁴⁹

The ER Respondents state that laches "is an equitable counterpart to the statute of limitations, designed to discourage dilatory conduct" which "will generally bar a claim when the delay is unreasonable and results in prejudice to the opposing party."¹³⁵⁰ The ER Respondents contend that "[t]he doctrine of laches applies in administrative proceedings if the challenged administrative action has been unreasonably delayed, resulting in prejudice to a party against whom the action was taken"¹³⁵¹ and that laches is available against the State.¹³⁵² The ER Respondents contend that the Division has long been aware that the ER Respondents would be presenting a laches defense but failed to address

¹³⁴⁸ *City of Bisbee*, 52 Ariz. at 8, 78 P.2d at 985.

¹³⁴⁹ In addition to raising arguments in its closing brief on this issue, Concordia has submitted notice of joinder to those arguments raised by the ER Respondents. Concordia's Joinder.

¹³⁵⁰ *Sotomayor v. Burns*, 199 Ariz. 81, 82-83 ¶ 6, 13 P.3d 1198, 1199-1200 (2000).

¹³⁵¹ 2 Am. Jur. 2d *Administrative Law* § 269.

¹³⁵² *State v. Garcia*, 187 Ariz. 527, 530, 931 P.2d 427, 430 (App. 1996).

1 the issue in their principal brief, thereby waiving any objection they have to the defense.

2 The ER Respondents argue the following as examples of prejudice to Mr. Wanzek and Mr.
3 Bersch due to the age of this case:¹³⁵³

- 4 • For each lender for which it was the Custodian, ER maintained a separate
5 file.¹³⁵⁴ Those files were sent to Concordia and are no longer available
6 to assist with the defense.¹³⁵⁵
- 7 • Up to twelve of the lenders have died and thus could not testify.¹³⁵⁶
8 Many of the lenders who died were supporters of Mr. Wanzek or Mr.
9 Bersch who would have testified in their favor, such as John Norton.¹³⁵⁷
10 Similarly, Mrs. Wanzek's father, Judge Garst, was a significant investor
11 who could have testified but he passed away in 2009.¹³⁵⁸ Likewise, Mr.
12 Lawton is deceased; he owned a big rig truck dealership and was very
13 familiar with the industry.¹³⁵⁹ As the owner of a truck dealership, Mr.
14 Lawton would have been a compelling witness, with great experience in
15 truck financing.
- 16 • Witness after witness has confirmed that their memories have faded; they
17 cannot recall the 1998 to 2008 time period the way they can recall more
18 recent events.¹³⁶⁰
- 19 • Mr. Wanzek and Mr. Bersch no longer remember many details about the
20 call with Concordia's attorney when they were informed that the truck

22 ¹³⁵³ ER Respondents Br. at 67-69.

23 ¹³⁵⁴ Tr. at 1598.

24 ¹³⁵⁵ Tr. at 1598-1600.

25 ¹³⁵⁶ Tr. at 1601-1602.

26 ¹³⁵⁷ Tr. at 1601-1602.

27 ¹³⁵⁸ Tr. at 1610-1611.

28 ¹³⁵⁹ Tr. at 1601.

¹³⁶⁰ Chris Crowder (Tr. at 74-76, 172-173, 539, 544, 853, 906, 1890), Suellen LeMay (Tr. at 286, 340, 376, 384-385, 390, 402), Philip Hatch (Tr. at 452, 455, 457-458, 462-463, 490-491), Stephen Dennison (Tr. at 507, 517, 528-529), A. Craig Mason (Tr. at 828-829, 1836-1837), Kathleen Hodel (Tr. at 956, 957, 1008), Gary Clapper (Tr. at 1421), David Wanzek (Tr. at 1638-1642, 1652, 1656, 1658-1659, 1687-1688, 1697, 1704, 1723-1724), Michael Bersch (Tr. at 1754, 1904, 1917, 1926-1928), Cindy Aldridge (2010, 2012, 2018), John Gilje (Tr. at 2058), Michael Edward Carr (Tr. at 2194-2196, 2198-2200, 2211-2212).

1 loan contracts were not securities.¹³⁶¹

- 2 • Mr. Wanzek had email communications with the loan buyers as well as
- 3 with Concordia. Substantially all of those emails are no longer
- 4 available.¹³⁶²
- 5 • Likewise, Mr. Bersch had email communications with the loan buyers as
- 6 well as with Concordia. Those emails are no longer available.¹³⁶³
- 7 • Concordia no longer had records of payments before 2003. Those years
- 8 of payments were therefore not considered by the Division in calculating
- 9 restitution.¹³⁶⁴
- 10 • Sunset Financial has a document destruction practice, so many of its
- 11 documents from 1998 to 2008 are no longer available.¹³⁶⁵
- 12 • Sunset Financial's trade blotter only goes back to 2003, and thus does not
- 13 show earlier payments from Concordia.¹³⁶⁶
- 14 • Sunset Financial does not have Mr. Kirkman's or Mr. Smith's emails and
- 15 calendars from 2000,¹³⁶⁷ the year the selling agreement was signed.
- 16 • Sunset Financial no longer has records or executive calendars from the
- 17 time of Mr. Wanzek's and Mr. Bersch's trip to Kansas City.¹³⁶⁸

18 The ER Respondents further contend that the Division initially brought its charges in 2014 over
 19 events that occurred between 1998 and 2008, an unreasonable delay considering that the truck loans
 20 were widely known in the Lake Havasu City area¹³⁶⁹ with at least 137 truck investors and up to 446
 21 distinct investments.¹³⁷⁰ The ER Respondents contend that the Concordia truck loans were known by:
 22 the loan buyers, Sunset Financial, Pacific Financial, Fortress (the hedge fund interested in buying

23
 24 ¹³⁶¹ Tr. at 1704-1705, 1750-1751.

¹³⁶² Tr. at 1600.

25 ¹³⁶³ Tr. at 1753-1754.

¹³⁶⁴ Tr. at 1129, 1131.

26 ¹³⁶⁵ Tr. at 809, 816-817.

¹³⁶⁶ Tr. at 830.

27 ¹³⁶⁷ Tr. at 1832-1833.

¹³⁶⁸ Tr. at 1835-1836.

¹³⁶⁹ Tr. at 1602.

28 ¹³⁷⁰ Notice at ¶ 26.

1 Concordia), Chino Commercial Bank, Concordia's CPAs, and some truck dealerships.¹³⁷¹ The ER
 2 Respondents contend that the Division could have discovered Concordia through an examination of
 3 Mr. Albers' office in Phoenix,¹³⁷² or by reading Ms. LeMay's newspaper ad.¹³⁷³

4 The ER Respondents contend that the courts often look to analogous statutes of limitations
 5 when considering a reasonable delay under laches.¹³⁷⁴ As the truck loans were sold from 1998 to 2008,
 6 outside the timeframe of any limitations period, the ER Respondents contend the Division's claims
 7 should be barred by laches.

8 Concordia contends that the Division conceded that laches would apply to this proceeding at
 9 the Court of Appeals. Concordia argues that laches is present "both in its common law form and as an
 10 equitable bar to the request for restitution."¹³⁷⁵ Concordia asserts it was prejudiced by delay as many
 11 hard copy documents do not exist and its older correspondence contradicting Division witnesses was
 12 withheld by the Division and witnesses. Concordia argues that witnesses expressed an inability to
 13 remember information from as far back as seventeen years ago. Concordia further contends that laches
 14 does not require a showing of prejudice, but a change of circumstances through the delay, namely the
 15 impact of the Great Recession operating as a bar to Concordia's ability to pay restitution.

16 Concordia contends that Arizona applies analogous statutes of limitations to a laches analysis
 17 in equitable proceedings, as the Division has labeled this matter, and that the Division would bear the
 18 burden to demonstrate by evidence why it is inequitable to apply the one-year statute of limitations to
 19 private actions for alleged registration violations, under A.R.S. § 44-2004(A), against the
 20 Respondents.¹³⁷⁶

21
 22 ¹³⁷¹ Tr. at 777-779.

23 ¹³⁷² Tr. at 1388.

24 ¹³⁷³ Tr. at 373-374; Exh. ER-4.

25 ¹³⁷⁴ "While laches and the statute of limitations are distinct defenses, a laches determination is made with reference to the
 26 limitations period for the analogous action at law. If the plaintiff filed suit within the analogous limitations period, the strong
 27 presumption is that laches is inapplicable . . . However, if suit is filed outside of the analogous limitations period, courts
 28 often have presumed that laches is applicable." *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 835-836 (9th
 Cir. 2002).

¹³⁷⁵ Concordia Br. at 32.

¹³⁷⁶ Citing *Costello v. Muheim*, 9 Ariz. 422, 429, 84 P. 906, 908 (1906); *Tandy Corp. v. Malone & Hyde, Inc.*, 769 F.2d 362,
 365 (6th Cir. 1985) ("Under equitable principles the statute of limitations applicable to analogous actions at law is used to
 create a 'presumption of laches'"); *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 837 (9th Cir. 2002) ("We
 hold that the presumption of laches is triggered if any part of the claimed wrongful conduct occurred beyond the limitations
 period. To hold otherwise would 'effectively swallow the rule of laches, and render it a spineless defense'"); *Lavin v. Bd.*

Concordia argues that laches will traditionally bar claims when the claimant unreasonably delayed filing suit, resulting in prejudice to the opposing party.¹³⁷⁷ Concordia contends that prejudice may be shown through injury, including prejudicing the ability to mount a defense to claims, or through a change in position resulting from the delay.¹³⁷⁸ Concordia further contends that “Evidentiary prejudice includes such things as lost, stale, or degraded evidence, or witnesses whose memories have faded or who have died.”¹³⁷⁹ Concordia contends that laches may bar claims outright but also can justify “an exercise of discretion to adjust or reduce the requested recovery by a claimant.”¹³⁸⁰

Concordia contends that the evidence in this matter demonstrated “open and notorious sales” of the Concordia contracts by Mr. Bersch and Mr. Wanzek in Lake Havasu City, as well as by Sunset Financial in Phoenix.¹³⁸¹ Concordia further notes that Ms. LeMay advertised her displeasure in a 2009 newspaper advertisement seeking others who had Concordia contracts.¹³⁸²

Concordia argues that both injury and change of condition were established by the evidence at hearing. Concordia argues that it had to search through remaining hard copy files as far back as 1998 to demonstrate the Division’s asserted restitution amount “was off by more than one million dollars and still wrongly discounts hard copy documents of payments to [investors] based on ‘judgment calls.’”¹³⁸³ Concordia further notes that Sunset Financial’s correspondence and calendar entries no longer exist, which would have been highly material evidence against the hearsay statements made by the Sunset Financial witness contradicted by “hundreds of pages of documents” and the recollections of Mr. Crowder and Mr. Bersch.¹³⁸⁴ Concordia also notes that contract holder witnesses testified to having difficulty with questions from that time period, including Ms. LeMay,¹³⁸⁵ Ms. Hodel,¹³⁸⁶ and Mr. Gilje.¹³⁸⁷ Concordia contends that contract holders continually expressed an inability to remember

of Educ., 447 A.2d 516, 520 n.1 (N.J. 1982) (“Where the equitable cause of action is analogous to the one at law, laches may depend solely on the comparable statute of limitations”).

¹³⁷⁷ Citing *League of Arizona Cities & Towns v. Martin*, 219 Ariz. 556, 558 ¶ 6, 201 P.3d 517, 519 (2009).

¹³⁷⁸ Citing *Martin*, 219 Ariz. at 558 ¶ 6, 201 P.3d at 519; *Patchett v. DiVito*, 3 Ariz. App. 72, 74, 412 P.2d 69, 71 (1966).

¹³⁷⁹ Concordia Br. at 34, quoting *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 955 (9th Cir. 2001).

¹³⁸⁰ Concordia Br. at 34, citing *Flynn v. Rogers*, 172 Ariz. 62, 68, 834 P.2d 148, 154 (1992).

¹³⁸¹ Concordia Br. at 34.

¹³⁸² Tr. at 373-374; Exh. ER-4.

¹³⁸³ Concordia Br. at 35.

¹³⁸⁴ Concordia Br. at 35.

¹³⁸⁵ Tr. at 380.

¹³⁸⁶ Tr. at 960.

¹³⁸⁷ Tr. at 2058-2059.

1 details regarding information from or conversations with Concordia, information that would support
2 Concordia's equitable defenses.

3 Concordia contends that the Division seeks an unjust result which is barred by laches.¹³⁸⁸
4 Concordia argues that "only a very few [investors] were not made at least whole," and this was due to
5 the Great Recession, not bad conduct.¹³⁸⁹ Concordia contends that contract holders were in the same
6 place as others such as homeowners; truck drivers; and owners of Bear Sterns, General Motors, Merrill
7 Lynch, and AIG. Concordia argues that contract holders received financial recovery that was better
8 than the financial conditions of the time and better than the only other alternative, bankruptcy.
9 Concordia contends that the "Division's requested orders are not restitution and penalty, but business
10 destruction for acts voluntarily ceased nine years ago."¹³⁹⁰

11 The Division contends that laches is an affirmative defense and, as such, the Respondents bear
12 the burden to raise and prove it. The Division contends that it had no obligation to address any
13 affirmative defenses in its Opening Post-Hearing Brief. The Division notes that the ER Respondents'
14 argument, that the Division waived its right to respond to the laches defense, is not supported by any
15 cited authority. The Division contends that the waiver argument is "absurd" and would be "patently
16 unfair" if accepted.¹³⁹¹

17 The Division contends that laches does not apply against the State in matters affecting the public
18 interest unless a statute expressly allows such a defense.¹³⁹² The Division notes that no such statute
19 allows a laches defense against a securities enforcement action.

20 The Division argues that the Respondents' contention that the Division conceded the
21 applicability of laches in this proceeding before the Court of Appeals is incomplete and inaccurate.
22 The Division quotes excerpts from the Court of Appeals video recording, noting that the Arizona cases

23
24 ¹³⁸⁸ Concordia Br. at 36. Concordia cites the Arizona Supreme Court:

Laches is the equitable counterpart of a statute of limitations. A claim is considered unenforceable in an
25 action in equity where, under the totality of circumstances, the claim, by reason of delay in prosecution,
would produce an unjust result.

26 *Harris v. Purcell*, 193 Ariz. 409, 410 ¶ 2 n.2, 973 P.2d 1166, 1167 (1998).

27 ¹³⁸⁹ Concordia Br. at 36.

¹³⁹⁰ *Id.*

¹³⁹¹ Division Reply Br. at 57.

28 ¹³⁹² Citing *State ex rel. Darwin v. Arnett*, 235 Ariz. 239, 245 ¶ 33, 330 P.3d 996, 1002 (App. 2014); *Kerby v. State ex rel. Frohmiller*, 62 Ariz. 294, 307-308, 157 P.2d 698, 704 (1945).

1 where laches was applied to the State occurred when the government knew about the litigant's conduct
 2 but unreasonably or intentionally delayed to obtain a tactical advantage. The Division argues that for
 3 laches to apply, "the delay must come after the party against whom the defense is asserted becomes
 4 aware of or has knowledge of . . . his right."¹³⁹³ The Division contends that without prior knowledge
 5 of the Respondents' violations, the Division cannot be deemed to have delayed the enforcement
 6 action.¹³⁹⁴

7 The Division contends that it committed no delay. The Division notes that the evidence shows
 8 that the Division had no knowledge of the Respondents' activities until investor Sue Ellen LeMay
 9 submitted a complaint in July 2012.¹³⁹⁵ The Division argues that it promptly began an investigation,
 10 assigning an investigator in August 2012.¹³⁹⁶ The Division notes that it filed an enforcement action
 11 eighteen months later, in spite of the "obstructionist tactics" of the Respondents which included:
 12 Concordia refusing to honor the Division's subpoena duces tecum, necessitating the Division to work
 13 with the California Corporations Commissioner to subpoena Concordia documents and the testimony
 14 of Ken Crowder, Chris Crowder, and Mr. Dekmejian;¹³⁹⁷ and Mr. Besch and Mr. Wanzek obtaining
 15 two extensions to respond to the Division's subpoena before dissolving ER Financial and claiming they
 16 did not need to produce any of its records as ER Financial no longer existed.¹³⁹⁸

17 The Division contends that "[t]he lapse of time and purported prejudice Respondents complain
 18 about are self-inflicted wounds caused by" the Respondents failing to register with the Commission as
 19 required under A.R.S. §§ 44-1841 and 44-1842.¹³⁹⁹ The Division argues that the Respondents' failure
 20 to register prevented the Division from reviewing their activities and the Division could not act on
 21 violations without knowledge thereof.

22 Regarding the Respondents claim that their sales of Concordia securities were "open and
 23 notorious," the Division notes that "open and notorious" is a term of art applicable to the doctrine of
 24

25 ¹³⁹³ *Flynn*, 172 Ariz. at 66, 834 P.2d at 152 (quoting *Jerger v. Rubin*, 106 Ariz. 114, 117, 471 P.2d 726, 729 (1970)).

26 ¹³⁹⁴ "[L]aches penalizes inexcusable dilatory behavior; if the plaintiff legitimately was unaware of the defendant's conduct,
 laches is no bar to suit." *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 838 (9th Cir. 2002).

27 ¹³⁹⁵ Tr. at 1209.

¹³⁹⁶ Tr. at 1209.

¹³⁹⁷ Tr. at 1221-1222; Exhs. S-162 – S-165, S-171.

¹³⁹⁸ Tr. at 1228-1235; Exhs. S-160, S-168, S-174, S-183 – S-187.

28 ¹³⁹⁹ Division Reply Br. at 61.

adverse possession,¹⁴⁰⁰ which does not run against the state.¹⁴⁰¹

The Division argues that *Arnett* illustrates that laches does not apply here. In *Arnett*, the Arizona Department of Environmental Quality (“ADEQ”) became aware of a gasoline leak from an underground storage tank (“UST”) in 1990.¹⁴⁰² ADEQ learned the identity of the owner of the UST in February 2005.¹⁴⁰³ ADEQ sued the owner for the cost of cleanup and civil penalties in September 2010.¹⁴⁰⁴ The Court of Appeals affirmed the Superior Court’s holding that the owner’s deed for the land where the UST was located did not provide constructive notice to ADEQ of his ownership of the UST.¹⁴⁰⁵ The Court of Appeals further held that “[b]ecause the statute of limitations does not apply to this type of litigation, and because applying laches to bar ADEQ’s action in the instant case would adversely affect ADEQ’s ability to regulate USTs and would harm the public’s interest in safe water, the superior court properly rejected Arnett’s laches defense.”¹⁴⁰⁶

The Division notes that here, as in *Arnett*, no statute of limitations applies and that the Division brought an enforcement action within eighteen months of learning about the Respondents’ activities as opposed to ADEQ’s suit which came five-and-a-half years after learning the identity of the UST owner. The Division argues that laches would adversely affect the Division’s ability to remedy securities violations and would harm the public interest.

The Division contends that cases cited by the Respondents for the proposition that laches will presumptively apply to suits filed in equity, analogous to statutes of limitations, are inapposite as all but two involve suits between private litigants. The Division argues that of the remaining two cases involving government entities, one held laches barred a private litigant’s claim,¹⁴⁰⁷ and the other held laches would not bar an agency’s efforts in 1996 to collect an overpayment made to a hospital in 1981.¹⁴⁰⁸ The Division contends that the Respondents’ attempt to impose laches against the Division based on analogous limitations periods on private litigants under A.R.S. § 44-2004 fails as Arizona law

¹⁴⁰⁰ *Lewis v. Pleasant Country, Ltd.*, 173 Ariz. 186, 189, 840 P.2d 1051, 1054 (App. 1992).

¹⁴⁰¹ *Ziggy’s Opportunities, Inc. v. I-10 Indus. Park Developers*, 152 Ariz. 104, 107, 730 P.2d 281, 284 (App. 1986).

¹⁴⁰² *Arnett*, 235 Ariz. at 241 ¶ 5, 330 P.3d at 998.

¹⁴⁰³ *Id.* at 241 ¶ 13, 330 P.3d at 998.

¹⁴⁰⁴ *Id.* at 241 ¶ 14, 330 P.3d at 998.

¹⁴⁰⁵ *Id.* at 240-241, 243-244 ¶¶ 2, 24-26, 330 P.3d at 997-998, 1000-1001.

¹⁴⁰⁶ *Id.* at 245 ¶ 35, 330 P.3d at 1002.

¹⁴⁰⁷ *Lavin v. Bd. of Educ.*, 447 A.2d 516.

¹⁴⁰⁸ *Robert F. Kennedy Med. Ctr. v. Dep’t of Health Servs.*, 61 Cal. App. 4th 1357, 1362, 72 Cal. Rptr. 2d 180 (1998).

1 provides that “when the public interest is concerned, neither laches nor the statute of limitations applies
2 against the state, in the absence of a statute expressly allowing such defenses.”¹⁴⁰⁹

3 b) Analysis and Conclusion

4 The ER Respondents contend that the Division waived any objection to laches by failing to
5 mention it in their Opening Post-Hearing Brief. The Division argues that it did not have to address an
6 affirmative defense in the Opening Post-Hearing Brief and notes that the ER Respondents cite no
7 authority to support the waiver argument. Nor are we aware of any authority that would support the
8 waiver argument raised by the ER Respondents. Accordingly, we consider the arguments of all parties
9 regarding the issue of laches.

10 “[T]he doctrine of laches does not apply against the State or its agencies in matters affecting
11 the public interest absent a statute expressly allowing such a defense.”¹⁴¹⁰ As noted above, the purpose
12 of the Act is protection of the public. The Division notes that the Respondents have not cited any
13 statutory authority that would authorize a laches defense, and like the Division, we conclude that no
14 such statutory authority exists.

15 The Respondents have cited an Arizona case, *Garcia*, where the Court of Appeals affirmed the
16 trial court’s use of laches against the State, which, under color of statute, sought child support
17 arrearages to reimburse public aid provided for a dependent child.¹⁴¹¹ The ER Respondents note the
18 similarity between the sixteen-year delay in either determining paternity or seeking support in
19 *Garcia*¹⁴¹² and the age of the claims against them. The *Garcia* court noted that throughout the sixteen-
20 year period, the father lived across the street from the mother’s family.¹⁴¹³ A similar proximity can be
21 seen in this case, where many of the investors maintained ongoing business relationships and used the
22 accounting services of Mr. Wanzek and Mr. Bersch.

23 However, a key difference between *Garcia* and the matter before the Commission is that the
24 State in *Garcia* was found to have “sat on its claim for over nine years and lost crucial records” that
25

26 ¹⁴⁰⁹ *Kerby*, 62 Ariz. at 307–308, 157 P.2d at 704.

27 ¹⁴¹⁰ *Arnett*, 235 Ariz. at 245 ¶ 33, 330 P.3d at 1002.

¹⁴¹¹ *Garcia*, 181 Ariz. at 528, 931 P.2d at 428.

¹⁴¹² *Id.* at 529, 931 P.2d at 429.

28 ¹⁴¹³ *Id.*

1 showed the amounts of public benefits that had been paid.¹⁴¹⁴ Here, the Division filed its Notice in
2 February 2014, just over eighteen months after receiving a complaint from Ms. LeMay in July 2012.
3 During this period, the Division conducted its investigation to determine what violations, if any, could
4 be alleged under the Act.

5 Unreasonable delay is a necessary element of laches,¹⁴¹⁵ and this delay must come after the
6 party has become aware of its rights.¹⁴¹⁶ The Respondents assert delay against the Division apparently
7 because they believe the Division should have known about the Respondents' actions based upon "open
8 and notorious" sales by Mr. Bersch and Mr. Wanzek, sales by Sunset Financial in Phoenix, and the
9 2009 newspaper advertisement of Ms. LeMay. However, there is no evidence the Division had actual
10 knowledge of the Respondents' actions prior to the complaint received in July 2012. The Respondents
11 neither registered under A.R.S. §§ 44-1841 and 44-1842, nor filed a Form D notice of exemption from
12 registration. Furthermore, once the Division became aware of the Respondents' activities, the
13 Respondents obstructed the Division's investigation by refusing to comply with Division subpoenas.

14 The length of time between the alleged violations and the allegations themselves cannot be
15 attributed to unreasonable delay by the Division. Accordingly, laches will not bar the Division's
16 enforcement action.

17 3. Defenses of Linda Wanzek

18 a) Jurisdiction of the Marital Community

19 The ER Respondents contend that the Commission's statutory authority, to join a spouse in an
20 action for the purpose of determining liability of the marital community, presumes both the spouse and
21 the community are in Arizona. The ER Respondents argue that since the Wanzeks have lived in a non-
22 community property state, Florida, since 2010, the Commission has no jurisdiction over Ms. Wanzek
23 and there is no marital community over which the Commission may exercise jurisdiction against.

24 The Division notes that this argument was rejected by the Administrative Law Judge in the
25 Fourth Procedural Order, dated August 13, 2014, and the Division adopts the reasoning and authorities
26 therein.

27 ¹⁴¹⁴ *Id.* at 530, 931 P.2d at 430.

28 ¹⁴¹⁵ *Martin*, 219 Ariz. at 558 ¶ 6, 201 P.3d at 519.

¹⁴¹⁶ *Flynn*, 172 Ariz. at 66, 834 P.2d at 152.

As noted in the Fourth Procedural Order, the Commission has authority to join a spouse in an enforcement action under the Act to determine the liability of the marital community.¹⁴¹⁷ Generally, all property acquired by either the husband or the wife during the marriage is the community property of the husband and wife.¹⁴¹⁸ The Arizona Supreme Court has found that “the presumption of law is, in the absence of the contrary showing, that all property acquired and all business done and transacted during coverture, by either spouse, is for the community.”¹⁴¹⁹

Under A.R.S. § 25-214(B), “spouses have equal management, control and disposition rights over their community property and have equal power to bind the community.”¹⁴²⁰ Either spouse may contract debts and otherwise act for the benefit of the community except as prohibited under A.R.S. §

¹⁴¹⁷ A.R.S. § 44-2031 provides, in pertinent part:

C. The commission may join the spouse in any action authorized by this chapter to determine the liability of the marital community. This subsection does not authorize the commission to join any individual who is divorced from the defendant at the time an action authorized by this chapter is filed.

¹⁴¹⁸ **A.R.S. § 25-211. Property acquired during marriage as community property; exceptions; effect of service of a petition**

A. All property acquired by either husband or wife during the marriage is the community property of the husband and wife except for property that is:

1. Acquired by gift, devise or descent.

2. Acquired after service of a petition for dissolution of marriage, legal separation or annulment if the petition results in a decree of dissolution of marriage, legal separation or annulment.

B. Notwithstanding subsection A, paragraph 2, service of a petition for dissolution of marriage, legal separation or annulment does not:

1. Alter the status of preexisting community property.

2. Change the status of community property used to acquire new property or the status of that new property as community property.

3. Alter the duties and rights of either spouse with respect to the management of community property except as prescribed pursuant to section 25-315, subsection A, paragraph 1, subdivision (a).

¹⁴¹⁹ *Johnson v. Johnson*, 131 Ariz. 38, 45, 638 P.2d 705, 712 (1981), citing *Benson v. Hunter*, 23 Ariz. 132, 134-35, 202 P. 233, 233-34 (1921).

¹⁴²⁰ **A.R.S. § 25-214. Management and control**

A. Each spouse has the sole management, control and disposition rights of each spouse's separate property.

B. The spouses have equal management, control and disposition rights over their community property and have equal power to bind the community.

C. Either spouse separately may acquire, manage, control or dispose of community property or bind the community, except that joinder of both spouses is required in any of the following cases:

1. Any transaction for the acquisition, disposition or encumbrance of an interest in real property other than an unpatented mining claim or a lease of less than one year.

2. Any transaction of guaranty, indemnity or suretyship.

3. To bind the community, irrespective of any person's intent with respect to that binder, after service of a petition for dissolution of marriage, legal separation or annulment if the petition results in a decree of dissolution of marriage, legal separation or annulment.

25-214.¹⁴²¹ “[A] debt is incurred at the time of the actions that give rise to the debt.”¹⁴²² “In an action on such a debt or obligation the spouses shall be sued jointly and the debt or obligation shall be satisfied: first, from the community property, and second, from the separate property of the spouse contracting the debt or obligation.”¹⁴²³ “A debt incurred by a spouse during marriage is presumed to be a community obligation; a party contesting the community nature of a debt bears the burden of overcoming that presumption by clear and convincing evidence.”¹⁴²⁴

Florida is not a community property state.¹⁴²⁵ Under Florida law, “the law of the situs has primary control over property within its borders.”¹⁴²⁶ However, Florida courts have held that community property will retain its characteristics when brought into the state.¹⁴²⁷

The Wanzeks have lived in Florida since April 2010, after having resided in Lake Havasu City, Arizona, beginning in 1990.¹⁴²⁸ The fifty-three Custodial Agreements signed by Mr. Wanzek span a period of time from February 18, 1998, through July 18, 2008.¹⁴²⁹ The sixty-three Custodial Agreements signed by Mr. Bersch for ER span a period of time from September 11, 1998, through June 15, 2008.¹⁴³⁰ The sixteen Custodial Agreements signed by an unidentified person on behalf of ER

¹⁴²¹ A.R.S. § 25-215. Liability of community property and separate property for community and separate debts

A. The separate property of a spouse shall not be liable for the separate debts or obligations of the other spouse, absent agreement of the property owner to the contrary.

B. The community property is liable for the premarital separate debts or other liabilities of a spouse, incurred after September 1, 1973 but only to the extent of the value of that spouse's contribution to the community property which would have been such spouse's separate property if single.

C. The community property is liable for a spouse's debts incurred outside of this state during the marriage which would have been community debts if incurred in this state.

D. Except as prohibited in section 25-214, either spouse may contract debts and otherwise act for the benefit of the community. In an action on such a debt or obligation the spouses shall be sued jointly and the debt or obligation shall be satisfied: first, from the community property, and second, from the separate property of the spouse contracting the debt or obligation.

¹⁴²² *Arab Monetary Fund v. Hashim*, 219 Ariz. 108, 111, 193 P.3d 802, 805 (App. 2008).

¹⁴²³ A.R.S. § 25-215(D).

¹⁴²⁴ *Hrudka v. Hrudka*, 186 Ariz. 84, 91-92, 919 P.2d 179, 186-187 (App. 1995).

¹⁴²⁵ *Herrera v. Herrera*, 673 So. 2d 143, 144 (Fla. 5th DCA 1996).

¹⁴²⁶ *Quintana v. Ordone*, 195 So. 2d 577, 579 (Fla. 3d DCA 1967).

¹⁴²⁷ See *Republic Credit Corp. I v. Upshaw*, 10 So. 3d 1103, 1104 (Fla. 4th DCA 2009) (Since California does not recognize tenancy by the entireties as a form of ownership, proceeds from the sale of California home cannot retain characteristics it never had). See also *Quintana v. Ordone*, 195 So. 2d 577, 579 (Fla. 3d DCA 1967) (adopting the rule set forth in Restatement, Conflict of Law § 290 (1934) that the “interests of one spouse in movables acquired by the other during the marriage are determined by the law of the domicile of the parties when the movables are acquired”).

¹⁴²⁸ Tr. at 1588-1589.

¹⁴²⁹ See note 790, *supra*.

¹⁴³⁰ See note 913, *supra*.

1 Financial span a period of time from August 5, 1999, through January 19, 2007.¹⁴³¹ Under Arizona
 2 law, debts arising from these transactions, such as penalties or restitution that may be ordered by the
 3 Commission, would be considered as having been incurred at the time the actions occurred. Since all
 4 of the transactions at issue occurred while the Wanzeks were Arizona residents, any debts would have
 5 been incurred by the marital community.

6 The Wanzeks own real property in Arizona,¹⁴³² which remains community property. Any
 7 community property brought by the Wanzeks from Arizona to Florida remains community property
 8 under Florida law. Therefore, community property exists from which a community obligation may be
 9 satisfied. The Respondents have failed to establish that the Division lacks jurisdiction over Mrs.
 10 Wanzek and the marital community.

11 b) Americans with Disabilities Act

12 The ER Respondents contend that Ms. Wanzek has a disability and was denied a reasonable
 13 accommodation by the Commission. The ER Respondents assert that Ms. Wanzek has medical issues
 14 limiting her ability to travel.¹⁴³³ The ER Respondents assert that Ms. Wanzek, through counsel,
 15 requested a reasonable accommodation of a broadcast of the hearing to allow her to participate in her
 16 defense. The ER Respondents note that the Commission “routinely broadcasts its hearings (other than
 17 securities hearings) over the internet and it has the personnel and equipment to do so readily at
 18 hand.”¹⁴³⁴ The ER Respondents contend that Ms. Wanzek had a due process right to participate in her
 19 defense and attend the hearings against her, as well as a right under the Americans with Disabilities
 20 Act (“ADA”) to a reasonable accommodation. The ER Respondents state that many witnesses were
 21 allowed to testify by phone, but Ms. Wanzek was not permitted even an audio feed to monitor the
 22 hearing. The ER Respondents state that on November 22, 2016, the Commission’s Executive Director
 23 refused to allow a broadcast, noting the Commission’s desire to protect the identity of its investigators
 24 and the privacy of investors. The ER Respondents contend that “[t]hese concerns cannot trump [Ms.
 25 Wanzek’s] constitutional and statutory rights, arguing that the Commission could have set up a secure
 26

27 ¹⁴³¹ See note 914, *supra*.

¹⁴³² Tr. at 1626.

¹⁴³³ Tr. at 1589; Objection to Subpoena (March 27, 2015) at Exh. A.

¹⁴³⁴ ER Respondents Br. at 74.

1 web feed.

2 The Division argues that the ER Respondents never requested a reasonable accommodation for
3 Ms. Wanzek or a secure web feed, rather they asked the Commission to publicly broadcast the
4 hearing.¹⁴³⁵ The Division notes that the ER Respondents' request to the Commission's Executive
5 Director did not state that Ms. Wanzek was disabled and it failed to mention either the ADA or the
6 term "reasonable accommodation." The Division argues that the Commission's Executive Director
7 acted within her discretion by denying the request for a public broadcast. Further, the Division argues
8 that an alleged ADA violation is not a defense to liability in this action.¹⁴³⁶

9 The November 22, 2016 Letter from the Executive Director ("ED Letter") referenced an email
10 the Executive Director had received from counsel for the ER Respondents.¹⁴³⁷ A copy of this email
11 was not filed and has not been made a part of the record. The ED Letter states that counsel for the ER
12 Respondents requested a public broadcast of the hearing for the following reasons: Ms. Wanzek lives
13 in Florida and will be unable to travel for the hearing due to health issues; Mr. Wanzek lives in Florida
14 and will attend part of the hearing to testify, but he cannot attend the entire hearing due to business and
15 family issues; Mr. Bersch lives in Lake Havasu City and will travel to Phoenix to testify, but he cannot
16 attend the entire hearing; and dozens of investor witnesses, many from Lake Havasu City, will testify
17 by phone but may want to monitor the hearing, which could also assist in coordinating their call in
18 times.¹⁴³⁸ The request made by the ER Respondents did not reference the ADA or the phrase
19 "reasonable accommodation" with regard to Ms. Wanzek. Further, the request made was for a public
20 broadcast for the stated benefit of multiple Respondents and witnesses, with no alternative request to
21 provide a secure broadcast or audio feed for Ms. Wanzek.

22 The Executive Director denied the ER Respondents' request for the following reasons: the
23 Commission's practice of not broadcasting securities matters is consistent with proceedings in other
24 forums such as superior court and federal district court; witnesses had been permitted to appear
25

26 ¹⁴³⁵ Letter from Jodi Jerich to Timothy Sabo (November 22, 2016) at 1.

27 ¹⁴³⁶ Division Reply Br. at 82, citing *In re Doe*, 60 P.3d 285, 291 (Hawaii 2002) (allegations of an ADA violation were not
a defense to a parental rights termination proceeding "because any purported violation may be remedied only in a separate
proceeding brought under the provisions of the ADA").

28 ¹⁴³⁷ ED Letter at 1.

¹⁴³⁸ *Id.*

telephonically; the Commission has an interest in protecting the identity of its securities investigators; and the Commission has an interest in respecting the privacy of investors who testify.¹⁴³⁹ We find no error in the Executive Director's decision to deny the request for a public broadcast of the hearing.

Moreover, the ER Respondents cite no authority by which Ms. Wanzek would be entitled to relief in these proceedings based upon her claim of an ADA violation.

Congress enacted the ADA to eliminate discrimination against people with disabilities and to create causes of action for qualified people who have faced discrimination . . . Congress did not intend to change the obligations imposed by unrelated statutes.¹⁴⁴⁰

The ER Respondents have established no basis in law or fact upon which the Commission should grant relief to Ms. Wanzek regarding the alleged ADA violation.

4. Right to Jury Trial

a) Argument

Concordia contends that the administrative hearing violated its right to a jury trial.¹⁴⁴¹ Concordia contends that the Seventh Amendment right to a jury trial "is not vitiated by assigning a matter to an administrative hearing or to an administrative agency."¹⁴⁴² Concordia, relying upon the United States Supreme Court's decision in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 109 S. Ct. 2782, 106 L. Ed. 2d 26 (1989), argues that there is "no sweeping exception to jury trial rights for all administrative proceedings."¹⁴⁴³ Concordia contends that the Supreme Court "has rejected defining a public right as simply assigning a legal matter to an executive agency" but rather "[t]he limited exception to the jury trial right for a public right proceeding is reserved to rights closely intertwined to a regulatory scheme and owned by the sovereign."¹⁴⁴⁴

Concordia argues that the Act, at A.R.S. § 44-2001, provides for a private cause of action for a violation of A.R.S. §§ 44-1841 or 44-1842, with damages calculated in a manner that parallels the

¹⁴³⁹ *Id.* at 2.

¹⁴⁴⁰ *In Interest of Torrance P.*, 187 Wis. 2d 10, 16, 522 N.W.2d 243, 246 (Ct. App. 1994).

¹⁴⁴¹ The ER Respondents join in the jury trial arguments set forth by Concordia. ER Respondents Br. at 75.

¹⁴⁴² Concordia Br. at 37.

¹⁴⁴³ Concordia Br. at 37, citing *Granfinanciera*, 492 U.S. at 52-53.

¹⁴⁴⁴ Concordia Br. at 38, citing *Granfinanciera*, 492 U.S. at 53.

1 damages found in A.A.C. R14-4-308(C)(1),¹⁴⁴⁵ under which the Division seeks restitution in this case
 2 for the alleged violations of A.R.S. §§ 44-1841 or 44-1842 by Concordia. Concordia argues that the
 3 restitution sought by the Division “is not a right belonging exclusively to the state” and that the
 4 Division’s claims are “for money judgments not integral to a regulatory scheme.”

5 Concordia contends that labeling a remedy as restitution is not dispositive of the jury trial issue,
 6 especially here where the term is defined as damages. Citing *Great-W. Life & Annuity Ins. Co. v.*
 7 *Knudson*, 534 U.S. 204, 122 S. Ct. 708, 151 L. Ed. 2d 635 (2002), Concordia argues that judgments
 8 imposing personal liability on a defendant to pay a sum of money as restitution are “viewed essentially
 9 as actions at law for breach of contract.”¹⁴⁴⁶ Concordia contends that restitution claims lie in equity
 10 when the plaintiff seeks a constructive trust or equitable lien on property essentially belonging to the
 11 plaintiff, which is not the case here.¹⁴⁴⁷ Concordia argues that the Division’s claim for restitution is
 12 the equivalent of a claim for debt which has a common law heritage of a right to a jury trial.

13 Citing *Tull v. United States*, 481 U.S. 412, 107 S. Ct. 1831, 95 L. Ed. 2d 365 (1987), Concordia
 14 further argues that the Seventh Amendment grants a defendant the right to a jury trial for a charge
 15 seeking a civil penalty. Concordia contends that the United States Supreme Court in *Tull* held that the
 16 federal government’s suit under the Clean Water Act compelled a jury trial as the claim sought statutory
 17 penalties.¹⁴⁴⁸

18 Concordia further contends that it has a jury trial right under Article 2, Section 23 of the Arizona
 19 Constitution,¹⁴⁴⁹ which preserves the right to jury trial which existed under common law at the time of
 20
 21

22 ¹⁴⁴⁵ A.A.C. R14-4-308(C) provides, in pertinent part:

23 C. If restitution is ordered by the Commission,

24 1. The amount payable as damages to each purchaser shall include:

25 a. Cash equal to the fair market value of the consideration paid, determined as of the date such payment was originally paid
 26 by the buyer; together with

27 b. Interest at a rate pursuant to A.R.S. § 44-1201 for the period from the date of the purchase payment to the date of
 28 repayment; less

c. The amount of any principal, interest, or other distributions received on the security for the period from the date of
 purchase payment to the date of repayment.

¹⁴⁴⁶ Concordia Br. at 39, quoting *Knudson*, 534 U.S. at 213.

¹⁴⁴⁷ Concordia Br. at 39, citing *Knudson*, 534 U.S. at 213-214.

¹⁴⁴⁸ Concordia Br. at 40, citing *Tull*, 481 U.S. at 418-419 (“Actions by the Government to recover civil penalties under
 statutory provisions therefore historically have been viewed as one type of action in debt requiring trial by jury”).

¹⁴⁴⁹ “The right of trial by jury shall remain inviolate.” Ariz. Const. art. II, § 23.

the adoption of the Arizona Constitution.¹⁴⁵⁰ Concordia argues that “Arizona’s constitutional provisions protecting the right to a jury trial are interpreted ‘consistent with the Seventh Amendment.’”¹⁴⁵¹ Concordia contends that while “Arizona courts rely on Seventh Amendment case law, the Arizona Constitution requires greater protection of the right to trial by jury than does the federal constitution.”¹⁴⁵² Concordia argues that Arizona courts have found a right to jury trial in cases with claims for damages, which are claims that existed at common law at the time of statehood.¹⁴⁵³

Concordia contends that while the Division asserts no jury trial right attaches to its claims because the Arizona Securities Act did not exist at common law, the United States Supreme Court has held that a Seventh Amendment analysis does not turn on whether a statute existed under common law.¹⁴⁵⁴ Concordia also argues that the Arizona Court of Appeals, in *State ex rel. Darwin v. Arnett*, 235 Ariz. 239, 245 ¶ 36, 330 P.3d 996, 1002 (App. 2014) and in *In re Estate of Newman*, 219 Ariz. 260, 272 ¶ 45, 196 P.3d 863, 875 (App. 2008), failed to properly consider the Seventh Amendment as directed by the Arizona Supreme Court.

The ER Respondents join in Concordia’s arguments regarding the right to a jury trial. The ER Respondents further argue that the Commission has the authority to rule on this constitutional issue. The ER Respondents cite several prior Commission decisions ruling on issues of state and federal constitutional law:

- The Commission found the System Improvement Benefit Mechanism

¹⁴⁵⁰ Concordia Br. at 40-41, citing *Brown v. Greer*, 16 Ariz. 215, 217, 141 P. 841, 842 (1914) (“[I]t does not create or extend the right, but by its declaration there is guaranteed the preservation of such right as it existed when the Constitution was adopted”) and *Fisher v. Edgerton*, 236 Ariz. 71, 81 ¶ 32, 336 P.3d 167, 177 (App. 2014) ([B]oth Article 2, Section 23, and Article 6, Section 17, of the Arizona Constitution provide in pertinent part that the right to a jury trial ‘shall remain inviolate’ and apply to the damage claims here because they existed at common law at the time of statehood”) (internal citations omitted).

¹⁴⁵¹ Concordia Br. at 41, quoting *Fisher*, 236 Ariz. at 81 ¶ 33, 336 P.3d at 177.

¹⁴⁵² Concordia Br. at 41, citing *Derendal v. Griffith*, 209 Ariz. 416, 419 ¶ 6, 104 P.3d 147, 150 (2005).

¹⁴⁵³ Concordia Br. at 41, citing *Fisher*, 236 Ariz. at 81 ¶¶ 32-33, 336 P.3d at 177; *Perkins v. Komarnyckyi*, 172 Ariz. 115, 118, 834 P.2d 1260, 1263 (1992) (parties in malpractice action have right to have every issue tried by jury), *Chartone, Inc. v. Bernini*, 207 Ariz. 162, 170, ¶ 30, 83 P.3d 1103, 1111 (App. 2004) (defendants had a right to a jury trial on damages), *Mozes v. Daru*, 4 Ariz. App. 385, 391, 420 P.2d 957 (1966) (right to jury determination of liability and damages in connection with counterclaim in tort action).

¹⁴⁵⁴ Concordia Br. at 41-42, citing *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709, 119 S. Ct. 1624, 1638, 143 L. Ed. 2d 882 (1999); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 347-348, 118 S. Ct. 1279, 1284, 140 L. Ed. 2d 438 (1998).

constitutional.¹⁴⁵⁵

- The Commission has repeatedly found that it would be an unconstitutional violation of the Commerce Clause to apply A.R.S. §§ 40-285 and/or 40-301 to certain out-of-state companies.¹⁴⁵⁶
- The Commission applied the test from *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980), in considering the constitutionality of regulating commercial speech in adopting the Commission's Consumer Proprietary Network Information rules.¹⁴⁵⁷
- The Commission rejected a jurisdictional challenge that the Affiliated Interest Rules constitute an unconstitutional burden on interstate commerce.¹⁴⁵⁸
- The Commission found a utility's line extension agreements were not unconstitutional.¹⁴⁵⁹
- The Commission found its affiliated interest rules did not violate the Commerce Clause or the Supremacy Clause.¹⁴⁶⁰

The Division contends that the Respondents are not entitled to a jury trial. The Division contends that controlling Arizona precedent establishes that "[u]nless expressly provided for by statute, 'there is no right to a jury trial on statutory claims that did not exist at common law prior to statehood.'"¹⁴⁶¹ The Division contends that it has brought this administrative enforcement action

¹⁴⁵⁵ *In the Matter of the Application of Arizona Water Co.*, Decision No. 74463 (April 22, 2014) at 39-41. The ER Respondents note that the Arizona Supreme Court affirmed this decision in *Residential Util. Consumer Office v. Arizona Corp. Comm'n*, 240 Ariz. 108, 113 ¶ 20, 377 P.3d 305, 310 (2016).

¹⁴⁵⁶ *In the Matter of the Application of Midvale Telephone Company, Inc.*, Decision No. 75927 (January 13, 2017) (and multiple decisions cited therein).

¹⁴⁵⁷ *In the Matter of the Dissemination of Individual Customer Proprietary Network Info. by Telecomm. Carriers*, Decision No. 68292 (Nov. 14, 2005).

¹⁴⁵⁸ *In the Matter of the Application of Cellco Partnership DBA Verizon Wireless and Alltel Communications of the Sw. Ltd. P'ship*, Decision No. 71260 (September 3, 2009).

¹⁴⁵⁹ *Chantel v. Mohave Electric Coop, Inc.*, Decision No. 67089 (June 29, 2004) at Finding of Fact No. 79.

¹⁴⁶⁰ *In the Matter of the Notice of Proposed Adoption of Rules to Provide for Regulation of Public Utility Companies with Unregulated Affiliates*, Decision No. 56844 (March 14, 1990). The ER Respondents note that this conclusion was affirmed in *Arizona Corp. Comm'n v. State ex rel. Woods*, 171 Ariz. 286, 299, 830 P.2d 807, 820 (1992).

¹⁴⁶¹ *Arnett*, 235 Ariz. at 245 ¶ 36, 330 P.3d at 1002, quoting *Newman*, 219 Ariz. at 272 ¶ 45, 196 P.3d at 875; also citing *Life Inv'rs Ins. Co. of Am. v. Horizon Res. Bethany, Ltd.*, 182 Ariz. 529, 532 ¶ 45, 898 P.2d 478, 481 (App. 1995).

pursuant to the Act, which was enacted in 1951, and expressly authorizes the Commission to provide restitution¹⁴⁶² and to assess administrative penalties after a hearing.¹⁴⁶³ The Division notes that with statutory authority to provide restitution, the Commission promulgated A.A.C. R14-4-308.¹⁴⁶⁴

The Division contends that the Respondents do not have a right to a jury trial because, as in *Arnett*, *Estate of Newman*, and *Life Investors*, the statutory causes of action and remedies sought did not exist when the Arizona Constitution was adopted in 1910. The Division contends that the use of the word “damages” in A.A.C. R14-4-308(C) does not change the jury trial analysis as the defendants in *Arnett* and *Estate of Newman* were defending against claims for damages.¹⁴⁶⁵ The Division concludes that the controlling rulings of *Arnett*, *Estate of Newman*, and *Life Investors* dispose of the Respondents’ alleged right to a jury trial.

The Division further argues that “[t]he United State Supreme Court has held that the Seventh Amendment right to a jury trial does not apply to administrative proceedings.”¹⁴⁶⁶ The Division argues that legislatures may assign administrative agencies to enforce certain laws or adjudicate “public

¹⁴⁶² A.R.S. § 44-2032 provides, in pertinent part:

If it appears to the commission, either on complaint or otherwise, that any person has engaged in, is engaging in or is about to engage in any act, practice or transaction that constitutes a violation of this chapter, or any rule or order of the commission under this chapter, the commission, in its discretion may:

1. Issue an order directing such person to cease and desist from engaging in the act, practice or transaction, or doing any other act in furtherance of the act, practice or transaction, and to take appropriate affirmative action within a reasonable period of time, as prescribed by the commission, to correct the conditions resulting from the act, practice or transaction including, without limitation, a requirement to provide restitution as prescribed by rules of the commission.

¹⁴⁶³ A.R.S. § 44-2036 provides, in pertinent part:

A. A person who, in an administrative action, is found to have violated any provision of this chapter or any rule or order of the commission may be assessed an administrative penalty by the commission, after a hearing, in an amount of not to exceed five thousand dollars for each violation.

¹⁴⁶⁴ A.A.C. R14-4-308 provides, in pertinent part:

A. When a person or persons have violated the Securities Act or the IM Act, or any rule or order of the Commission, the Commission may require the person or persons to make rescission and/or restitution as provided herein.

* * *

C. If restitution is ordered by the Commission,

1. The amount payable as damages to each purchaser shall include:

a. Cash equal to the fair market value of the consideration paid, determined as of the date such payment was originally paid by the buyer; together with

b. Interest at a rate pursuant to A.R.S. § 44-1201 for the period from the date of the purchase payment to the date of repayment; less

c. The amount of any principal, interest, or other distributions received on the security for the period from the date of purchase payment to the date of repayment.

¹⁴⁶⁵ Division Reply Br. at 66, citing *Arnett*, 235 Ariz. at 241 ¶15, 330 P.3d at 996; *Estate of Newman*, 219 Ariz. at 264 ¶ 6, 196 P.3d at 867.

¹⁴⁶⁶ Division Reply Br. at 67, citing *Atlas Roofing Co. v. Occupational Safety and Health Review Comm 'n*, 430 U.S. 442, 455 (1977); *Tull*, 481 U.S. at 418, n.4 (1987) (“[T]he Seventh Amendment is not applicable to administrative proceedings”).

rights.”¹⁴⁶⁷ The Division contends that the Respondents’ arguments against the Division’s action being a public right, because A.R.S. § 44-2001(A) allows a private cause of action for an investor and because restitution is not integral to a regulatory scheme, are contrary to Arizona law. Quoting the Arizona Court of Appeals in *Trimble v. Am. Sav. Life Ins. Co.*, 152 Ariz. 548, 733 P.2d 1131 (App. 1986), the Division contends that enforcement actions such as this are “brought for the public benefit” and “[t]he public interest is served by the cessation of illegal and fraudulent acts.”¹⁴⁶⁸ The Division further argues that “[r]equiring persons who violate the Securities Act ‘to make restitution to the victims has a deterrent effect, which also serves the public interest.’”¹⁴⁶⁹ The Division further quotes *Trimble* for the proposition that “[t]he fact that the action in its present status is directed toward remedies for individuals does not diminish the public interest nature of the proceeding.”¹⁴⁷⁰ Since this proceeding implicates public rights, the Division argues that the Respondents are not entitled to a jury trial for the statutory remedies of restitution and penalties.

The Division further contends that the Respondents rely upon inapposite cases. The Division contends that the Respondents cite eight Arizona cases addressing jury trial rights that do not involve statutory causes of action or administrative enforcement proceedings. The Division further differentiates three other cases¹⁴⁷¹ cited by the Respondents, that held the Seventh Amendment right to a jury trial will apply to statutory causes of action analogous to common law causes of action decided in the 18th century English law courts, because there is no such 18th century action analogous to a securities enforcement action. The Division argues that *Tull* involved an action in federal district court, a forum that allows a trial by jury, as opposed to an administrative proceeding,¹⁴⁷² and that *Tull* reaffirmed that “the Seventh Amendment is not applicable to administrative proceedings.”¹⁴⁷³ The Division also differentiates *Knudson*, wherein the United State Supreme Court found that an insurer seeking to enforce an ERISA plan’s reimbursement provision against an insured was not a statutory

¹⁴⁶⁷ Division Reply Br. at 67, citing *Atlas Roofing*, 430 U.S. at 450.

¹⁴⁶⁸ Division Reply Br. at 67, quoting *Trimble*, 152 Ariz. at 555-556, 733 P.2d at 1138-1139.

¹⁴⁶⁹ Division Reply Br. at 67-68, quoting *Trimble*, 152 Ariz. at 556, 733 P.2d at 1139.

¹⁴⁷⁰ *Trimble*, 152 Ariz. at 556, 733 P.2d at 1139.

¹⁴⁷¹ *Del Monte Dunes*, 526 U.S. 687; *Feltner*, 523 U.S. 340; *Granfinanciera*, 492 U.S. 33.

¹⁴⁷² *Tull*, 481 U.S. at 415.

¹⁴⁷³ *Id.* at 418, n.4 (internal citations omitted).

1 action but rather a claim for personal liability on a contractual obligation.¹⁴⁷⁴ The Division notes that
 2 here, unlike *Knudson*, the Division cannot and does not seek contractual liability against the
 3 Respondents as the Division is not a party to the investment contracts. Rather, the Division seeks to
 4 impose statutory liability for the Respondents' violations of the Act.

5 The Division further incorporates and adopts the analysis of the Administrative Law Judge as
 6 set forth in the Twenty-Ninth Procedural Order, dated November 28, 2016, wherein the Administrative
 7 Law Judge concluded that Concordia had not established a basis to recommend dismissal of the
 8 proceeding.

9 b) Analysis and Conclusion

10 The Arizona Constitution grants the legislature authority to enlarge the powers and extend the
 11 duties of the Commission.¹⁴⁷⁵ The relief sought by the Division in this matter has been legislatively
 12 authorized by the Act. Under A.R.S. § 44-2032, the Commission has discretion to order restitution for
 13 violations of the Act. The Commission may also order administrative penalties, after a hearing,
 14 pursuant to A.R.S. § 44-2036. The Commission may not order restitution or penalties prior to providing
 15 a respondent with a notice of a hearing or a notice of an opportunity for a hearing, and the Commission
 16 shall provide a hearing when requested.¹⁴⁷⁶ The Respondents' contention, that they have a
 17 constitutional right to a jury trial, challenges the constitutionality of this statutory scheme which places
 18 the discretion to order restitution and administrative penalties with the Commission, as well as the
 19 process of holding hearings before the Commission

20 The United States Supreme Court has repeatedly noted that determination of the
 21 constitutionality of a statute is beyond the authority of an agency.¹⁴⁷⁷ This principal has been reiterated

22 ¹⁴⁷⁴ *Knudson*, 534 U.S. at 210, 221

23 ¹⁴⁷⁵ **Ariz. Const. art. XV, § 6 Enlargement of powers by legislature; rules and regulations**

24 Section 6. The law-making power may enlarge the powers and extend the duties of the corporation commission, and may
 25 prescribe rules and regulations to govern proceedings instituted by and before it; but, until such rules and regulations are
 26 provided by law, the commission may make rules and regulations to govern such proceedings.

25 ¹⁴⁷⁶ See A.R.S. § 44-1972(C), (E).

26 ¹⁴⁷⁷ See *Pub. Utilities Comm'n of State of Cal. v. United States*, 355 U.S. 534, 539, 78 S. Ct. 446, 450, 2 L. Ed. 2d 470
 27 (1958) (Issue regarding the constitutionality of California statute allowing Public Utilities Commission to permit reduced
 28 rates for common carriers to transport property at reduced rates for governments was "a constitutional one that the
 Commission can hardly be expected to entertain"); *Oestereich v. Selective Serv. Sys. Local Bd. No. 11, Cheyenne, Wyo.*,
 393 U.S. 233, 242, 89 S. Ct. 414, 419, 21 L. Ed. 2d 402 (1968) ("[A] challenge to the validity of the administrative procedure
 itself . . . presents an issue beyond the competence of the Selective Service Boards to hear and determine. Adjudication of
 the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative

time and again in federal circuit courts.¹⁴⁷⁸ Similarly, state courts have ruled that the constitutionality of legislation is a matter for the courts, not agencies.¹⁴⁷⁹

The ER Respondents correctly note that the Commission has ruled on constitutional issues in other matters. However, the constitutional issues addressed by the Commission in those prior Decisions differ from the present matter in that here we are being asked to consider the constitutionality

agencies"); *Weinberger v. Salfi*, 422 U.S. 749, 765, 95 S. Ct. 2457, 2467, 45 L. Ed. 2d 522 (1975) (The issue of constitutionality of a statutory requirement is "a matter which is beyond [the Secretary of Health, Education, and Welfare's] jurisdiction to determine"); *Mathews v. Diaz*, 426 U.S. 67, 76, 96 S. Ct. 1883, 1890, 48 L. Ed. 2d 478 (1976) (Constitutional law question is "beyond the competence of the Secretary [of the Department of Health, Education, and Welfare] to decide"); *Califano v. Sanders*, 430 U.S. 99, 109, 97 S. Ct. 980, 986, 51 L. Ed. 2d 192 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures").

¹⁴⁷⁸ See *Finnerty v. Cowen*, 508 F.2d 979, 982 (2d Cir. 1974) ("Federal agencies like the [Railroad Retirement] Board have neither the power nor the competence to pass on the constitutionality of administrative or legislative action") (internal quotations and citations omitted); *Buckeye Indus., Inc. v. Sec'y of Labor, Occupational Safety & Health Review Comm'n*, 587 F.2d 231, 235 (5th Cir. 1979) ("No administrative tribunal of the United States has the authority to declare unconstitutional the Act which it is called upon to administer"); *Denberg v. U.S. R.R. Ret. Bd.*, 696 F.2d 1193, 1196 (7th Cir. 1983) ("[T]he Railroad Retirement Board does not have the authority to declare statutes that it administers unconstitutional"); *Cent. Neb. Pub. Power & Irr. Dist. v. Fed. Power Comm'n*, 160 F.2d 782, 783 (8th Cir. 1947) ("[T]he [Federal Power] Commission is not empowered to and therefore declined to pass upon the constitutionality of the requirements imposed upon it by Section 10(e) [of the Federal Power Act]"); *Montana Chapter of Ass'n of Civilian Technicians, Inc. v. Young*, 514 F.2d 1165, 1167 (9th Cir. 1975) ("[F]ederal administration agencies have neither the power nor competence to pass on the constitutionality of statutes"); *Panitz v. D.C.*, 112 F.2d 39, 42 (D.C. Cir. 1940) ("[M]inisterial officers cannot question the constitutionality of the statute under which they operate"); *Riggin v. Office of Senate Fair Employment Practices*, 61 F.3d 1563, 1569 (Fed. Cir. 1995) ("A finding that the agency lacks jurisdiction to decide constitutional questions is especially likely when the constitutional claim asks the agency to act contrary to its statutory charter").

¹⁴⁷⁹ See *Hamilton v. Jeffrey Stone Co.*, 6 Ark. App. 333, 335, 641 S.W.2d 723, 725 (1982) ("Even though the [Workers' Compensation] Commission may not have authority to declare statutes unconstitutional, we believe such issues should first be raised at the Administrative Law Judge or Commission level"); *Kerrigan v. Fair Employment Practice Com.*, 91 Cal. App. 3d 43, 52, 154 Cal. Rptr. 29, 36 (Ct. App. 1979) ("The courts have a duty to protect constitutional or fundamental rights from infringement by administrative agencies. The courts, not the administrative agency, have the valuable expertise, the broad background and constitutional foundation necessary to perceive and defend constitutional and fundamental rights from a balanced perspective"); *State ex rel. Atl. Coast Line R. Co. v. State Bd. of Equalizers*, 84 Fla. 592, 597, 94 So. 681, 683 (Fla. 1922) ("The right to declare an act unconstitutional is purely a judicial power, and cannot be exercised by the officers of the executive department"); *Wilson v. Bd. of Indiana Employment Sec. Div.*, 270 Ind. 302, 305, 385 N.E.2d 438, 441 (Ind. 1979) ("[T]he question presented is of constitutional character . . . we think that the resolution of such a purely legal issue is beyond the expertise of the [Indiana Employment Security] Division's administrative channels and is thus a subject more appropriate for judicial consideration"); *Salsbury Labs. v. Iowa Dep't of Envtl. Quality*, 276 N.W.2d 830, 836 (Iowa 1979) ("Agencies cannot decide issues of statutory validity"); *Felten Truck Line, Inc. v. State Bd. of Tax Appeals*, 183 Kan. 287, 293, 327 P.2d 836, 842 (Kan. 1958) ("The [Kansas] Commission [of Revenue and Taxation] is not set up as a court to review the constitutionality of legislative enactments. It is an administrative body. It is the [C]ommission's duty to presume that the statutes are constitutional and valid"); *Albe v. Louisiana Workers' Comp. Corp.*, 97-0581 (La. 10/21/97), 700 So. 2d 824, 827-28, on reh'g in part sub nom. *Clark v. Schwegmann Giant Supermarket*, 97-0581 (La. 11/21/97), 701 So. 2d 1324 ("The courts of this state have consistently held that administrative agencies do not have the authority to determine questions of constitutionality"); *Marchi v. Acito*, 77 A.D.2d 118, 120, 432 N.Y.S.2d 908, 910 (1980) ("Constitutional questions are unsuited to resolution in administrative hearing procedures"); *Yakima Cty. Clean Air Auth. v. Glascam Builders, Inc.*, 85 Wash. 2d 255, 257, 534 P.2d 33, 34 (1975) ("An administrative tribunal is without authority to determine the constitutionality of a statute"); *Torres v. State ex rel., Wyoming Workers' Safety & Comp. Div.*, 2004 WY 92, ¶ 8, 95 P.3d 794, 796 (Wyo. 2004) ("Administrative agencies have no authority to determine the constitutionality of a statute").

1 of multiple provisions of the Act itself. This is a key distinction, as noted by the Arizona Court of
2 Appeals:

3 *A fundamental distinction must be recognized between constitutional*
4 *applicability of legislation to particular facts and constitutionality of the*
5 *legislation.* When a tribunal passes upon constitutional applicability, it
6 is carrying out the legislative intent, either express or implied or
7 presumed. When a tribunal passes upon constitutionality of the
8 legislation, the question is whether it shall take action which runs counter
9 to the legislative intent. We commit to administrative agencies the
10 power to determine constitutional applicability, but we do not commit to
11 administrative agencies the power to determine constitutionality of
12 legislation. Only the courts have authority to take action which runs
13 counter to the expressed will of the legislative body.¹⁴⁸⁰

14 The Respondents would have us rule upon the constitutionality of the legislation authorizing
15 the Commission to conduct hearings on alleged securities violations, and to order restitution and
16 administrative penalties when violations have been found. We decline this invitation to usurp the
17 power of the judiciary. Instead, the Commission elects to act within its statutorily granted authority to
18 consider this case on its merits. The Respondents have not established a basis for the Commission to
19 dismiss this action based on their claim of a right to a jury trial.

20 5. California Order

21 Exhibits S-176a and S-176b are copies of a California Order served on Mr. Bersch and Mr.
22 Wanzek alleging qualification and anti-fraud violations under California law for the sale of Concordia
23 Servicing Agreements. The California order became final as to Mr. Bersch and Mr. Wanzek when they
24 did not contest the allegations.¹⁴⁸¹ The ER Respondents argue that the California Order has no legal
25 significance and should be given little to no weight. The ER Respondents argue that Mr. Bersch and
26 Mr. Wanzek did not respond to the California Order for several reasons: unlike this proceeding, the

27 ¹⁴⁸⁰ *Estate of Bohn v. Waddell*, 174 Ariz. 239, 249, 848 P.2d 324, 334 (App. 1992) (emphasis in original) (quoting K. Davis,
28 *Administrative Law Treatise*, § 20.04 at 74 (1958)).

¹⁴⁸¹ Tr. at 1717, 1930-1931.

1 California Order contained no financial penalty; the California Order was not reportable to the Board
 2 of Accountancy; the California Order directed them to stop doing something they ceased years ago;
 3 and the cost of fighting the allegations would have been too high with this matter looming in
 4 Arizona.¹⁴⁸²

5 Prior to the hearing, the ER Respondents filed a motion in limine seeking to exclude Exhibits
 6 S-176a and S-176b from admission into evidence at hearing.¹⁴⁸³ In its response to the motion in limine,
 7 the Division argued that the California orders should be considered adoptive admissions, citing Rule
 8 801(d)(2)(B) of the Arizona Rules of Evidence¹⁴⁸⁴ and the Arizona Supreme Court's finding in *State*
 9 *v. Van Winkle*: "When a statement adverse to a defendant's interests is made in his presence and he fails
 10 to respond, evidence of the statement and the defendant's subsequent silence may be admissible as a
 11 tacit admission of the facts stated."¹⁴⁸⁵ In denying the ER Respondents' motion in limine, the
 12 Administrative Law Judge found that the California Order constituted an adopted admission by Mr.
 13 Bersch and Mr. Wanzek, and that Exhibits S-176a and S-176b were relevant and not unfairly
 14 prejudicial.¹⁴⁸⁶

15 At hearing, the Division offered Exhibits S-176a and S-176b into evidence.¹⁴⁸⁷ Exhibits S-176a
 16 and S-176b were admitted into evidence by the Administrative Law Judge over an objection of the ER
 17 Respondents on the basis that the testifying witness, Mr. Clapper, was not a proper custodian for the
 18 California Order.¹⁴⁸⁸

19 In their closing brief, the ER Respondents argue that Exhibits S-176a and S-176b should not be
 20 considered adopted admissions of Mr. Bersch and Mr. Wanzek. The Division discusses the California
 21 Order in the Statement of Facts section of its Opening Post-Hearing Brief,¹⁴⁸⁹ but does not cite to it
 22 when arguing proof of the alleged violations. In its Reply Brief, the Division neither mentions Exhibits
 23 S-176a and S-176b, nor responds to the arguments made by the ER Respondents.

24 ¹⁴⁸² Tr. at 1605-1609, 1740, 1754-1755, 1936-1937.

25 ¹⁴⁸³ ER Respondents' Motion in Limine Number One (July 27, 2015).

26 ¹⁴⁸⁴ Rule 801(d)(2)(B) provides that a statement is admissible against an opposing party if the statement is "one the party
 manifested that [he] adopted or believed to be true."

27 ¹⁴⁸⁵ *State v. Van Winkle*, 229 Ariz. 233, 235 ¶ 7, 273 P.3d 1148, 1150 (2012).

28 ¹⁴⁸⁶ Twenty-First Procedural Order (Sept. 12, 2016).

¹⁴⁸⁷ Tr. at 1245-1246. Exhibits S-176a and S-176b were not moved to admit against Concordia. *Id.*

¹⁴⁸⁸ Tr. at 1245-1247.

¹⁴⁸⁹ Division Opening Br. at 45-46.

Under A.A.C. R-14-3-109(X), the Administrative Law Judge shall rule on the admissibility of evidence following an objection.¹⁴⁹⁰ We find no basis to modify or overrule the Administrative Law Judge's findings as to Exhibits S-176a and S-176b. However, considering the ER Respondents' arguments against the California Order and the Division's minimal reliance upon it, we place little evidentiary value upon Exhibits S-176a and S-176b.

6. Return of Titles

The ER Respondents deny the Division's assertion that they acted improperly by returning the vehicle titles to Concordia in 2010. The ER Respondents argue that Concordia had not paid custodial fees since 2008,¹⁴⁹¹ and therefore, Concordia was in breach of the agreements. The ER Respondents contend that they no longer were under a contractual duty to keep the titles, but they continued to do so until 2010 as a courtesy to the investors. The ER Respondents further argue that the Second Amendments substituted Concordia in place of ER Financial as the Custodian.¹⁴⁹² The Division asserts no counterargument in its Reply Brief.

We note that the Division has asserted no violations of the Act arising from ER Financial's return of the vehicle titles to Concordia. Under the terms of the Servicing Agreements and the Custodial Agreements, ER Financial was required to hold the vehicle titles until either: 1) the trucker defaulted or paid off the loan, at which time the documents would be returned to Concordia; or 2) Concordia defaulted under the terms of the Servicing Agreement, at which time the investor could request the documents if Concordia failed to cure its default.¹⁴⁹³ The Second Amendment did not take effect until December 1, 2011.¹⁴⁹⁴ The return of the titles to Concordia in 2010 effectively eliminated the investors' collateral.¹⁴⁹⁵ While the return of the titles is not relevant to a finding of any violation alleged by the Division, the Commission may consider this fact in determining the appropriateness of any remedy to the alleged violations.

¹⁴⁹⁰ A.A.C. R-14-3-109(X) provides:

Objections and rulings. When objections are made to the admission or exclusion of evidence, the grounds relied upon shall be stated briefly. The presiding officer shall rule on the admissibility of all evidence.

¹⁴⁹¹ Tr. at 1738.

¹⁴⁹² Tr. at 1738-1739.

¹⁴⁹³ See, e.g., Exhs. S-12a at §§ 3.7, 4, S-12b at § 4.1.

¹⁴⁹⁴ See, e.g. Exh. S-12d.

¹⁴⁹⁵ Tr. at 1696-1697, 1753.

1 7. Failure to Follow Discovery Rules

2 The ER Respondents state that they had sent discovery requests to the Division, who refused to
3 comply. The ER Respondents contend here, as they did in their January 26, 2015 Response to the
4 Division's Motion to Quash, that civil discovery rules apply and that the Commission has long allowed
5 full discovery in administrative cases.¹⁴⁹⁶ The ER Respondents contend that civil discovery should
6 have been provided and that they have been prejudiced in their ability to prepare their defense.¹⁴⁹⁷

7 The Division argues here, as it did in its January 5, 2015 Motion to Quash and February 3, 2015
8 Reply in Support of Motion to Quash, that the Arizona Rules of Civil Procedure do not apply to
9 discovery in this proceeding. The Division contends that the discovery provisions of the
10 Administrative Procedures Act and the Commission's Rules govern discovery in this proceeding.¹⁴⁹⁸
11 The Division further incorporates in its argument the reasoning found in *WMF Management, LLC*,
12 Twelfth Procedural Order dated July 19, 2017, A.C.C. Docket No. S-20988A-16-0354, wherein the
13 Administrative Law Judge denied discovery requests made under the Rules of Civil Procedure.

14 The Administrative Procedures Act expressly limits discovery in administrative hearings, as
15 A.R.S. § 41-1062(A)(4) provides:

16 Prehearing depositions and subpoenas for the production of documents
17 may be ordered by the officer presiding at the hearing, provided that the
18 party seeking such discovery demonstrates that the party has reasonable
19 need of the deposition testimony or materials being sought. ...
20 Notwithstanding the provisions of section 12-2212, no subpoenas,
21 depositions or other discovery shall be permitted in contested cases

22

23 ¹⁴⁹⁶ Citing *Arizona Public Service Co.*, Procedural Order dated March 10, 2017, A.C.C. Docket Nos. E-01345A-16-0036,
24 et al. at 4 (applying Rules of Civil Procedure to Commission discovery dispute); *Epcor Water Arizona, Inc.*, Procedural
25 Order dated September 7, 2016, A.C.C. Docket Nos. E-01345A-16-0036, et al. at 4-5 (applying Rules of Civil Procedure
26 to Commission discovery dispute and noting the "discovery process is intended to allow parties to prepare for hearing by
learning the positions and supporting documents of the other parties, thereby minimizing surprise and increasing the
efficiency of hearings"); *Arizona Public Service Co.*, Procedural Order dated February 6, 2017, A.C.C. Docket Nos. E-
01345A-16-0036, et al. (granting motion to compel); *Arizona Public Service Co.*, Procedural Order dated November 17,
2016, A.C.C. Docket Nos. E-01345A-16-0036, et al. (compelling deposition); *Sulphur Springs Valley Elec. Coop., Inc.*,
Procedural Order dated May 16, 2016, A.C.C. Docket Nos. E-01575A-15-0312 (suggesting discovery at Commission may
be broader than discovery available under civil rules).

27 ¹⁴⁹⁷ Concordia has submitted notice of joinder to those arguments raised by the ER Respondents. Concordia's Joinder.

28 ¹⁴⁹⁸ Citing A.R.S. § 41-1062(A)(4); A.A.C. R14-3-108(A); A.A.C. R14-3-109(L); A.A.C. R14-3-109(O); A.A.C. R14-3-
109(P).

except as provided by agency rule or this paragraph.

The Administrative Procedure Act and the Commission's Rules provide for discovery by subpoenas and depositions, upon a showing of reasonable need, and allow for the exchange of exhibits prior to hearing.¹⁴⁹⁹

Here, the Administrative Law Judge, after oral argument on the discovery issues, found that the Administrative Procedure Act applied, and ordered an accelerated production by the Division of documents that the Division intended to include in the parties' exchange of exhibits.¹⁵⁰⁰ We find no error in the Administrative Law Judge's ruling on the discovery requests made by the ER Respondents.

8. Violation of Due Process

a) Argument

Concordia argues that while hearsay is admissible in an administrative proceeding, the hearsay must be reliable if it is to be the basis of an award.¹⁵⁰¹ Concordia contends its due process was violated because "the Division has withheld information contradicting hearsay or outlining the circumstances at the heart of such statements; and cuts [sic] witnesses to prevent cross examining them."¹⁵⁰²

Concordia contends that, on direct examination, Mr. Mason testified to having provided a binder of materials to the Division. Concordia argues that the Division withheld this information from the Respondents and the Administrative Law Judge ordered its production. Concordia asserts that the Division used these materials to impeach Mr. Chris Crowder when it had not yet complied with the order to produce them. Further, Concordia contends that the Division's line of questioning "was deliberately misleading and mischaracterized the documents then being sprung on the witness."¹⁵⁰³

Concordia further contends that "the information the Division had concealed contradicted Mr. Mason and exculpated Concordia, which provides an easy but unfortunate explanation for the Division's efforts to bury that information."¹⁵⁰⁴ Concordia argues that the Division received the binder

¹⁴⁹⁹ See A.R.S. § 41-1062(A)(4); A.A.C. R14-3-108(A), R14-3-109(L), R14-3-109(O), R14-3-109(P).

¹⁵⁰⁰ Eighth Procedural Order, dated February 13, 2015, at 5.

¹⁵⁰¹ Citing *Wieseler v. Prins*, 167 Ariz. 223, 227, 805 P.2d 1044, 1048 (App. 1990); *Reynolds Metals Co. v. Indus. Comm'n*, 98 Ariz. 97, 102, 402 P.2d 414, 417 (1965) (hearsay evidence may be acted upon "where the circumstances are such that the evidence offered is deemed by the [Industrial] Commission to be trustworthy").

¹⁵⁰² Concordia Br. at 43.

¹⁵⁰³ *Id.*

¹⁵⁰⁴ *Id.* at 44.

1 on July 12, 2013, over one year before the Amended Notice was filed alleging that Sunset Financial
2 did not approve sales.¹⁵⁰⁵ Concordia contends that before the Respondents had received the Sunset
3 Financial materials, Mr. Mason had testified that Mr. Albers sold Concordia investments before joining
4 Sunset Financial, when, in fact, Mr. Albers had worked exclusively as a broker for Sunset Financial
5 and an agent for Kansas City Life, and Sunset Financial's records contradicted Mr. Mason's
6 testimony.¹⁵⁰⁶

7 Concordia further notes that Mr. Mason testified that Sunset Financial never approved Mr.
8 Albers' sales, although the Sunset Financial documents revealed disclosures from Mr. Albers dating
9 back to 2001 in which he told Sunset Financial's compliance department that he sold Concordia, an
10 approved Sunset Financial product.¹⁵⁰⁷ Concordia further asserts that Sunset Financial's records
11 revealed the receipt of custodial fees and commissions consistent with the Selling Agreement with
12 Concordia, and its trade blotters included Mr. Albers' Concordia sales.¹⁵⁰⁸

13 Concordia asserts that prior to disclosing the Sunset Financial materials, "the Division
14 attempted to hearsay in Mr. Kirkman's denial of having approved sales" of the Concordia
15 investment.¹⁵⁰⁹ Concordia notes that Mr. Kirkman was terminated by Sunset Financial, in part because
16 of insufficient recordkeeping and failure to follow supervisory procedures relating to the approval of
17 products.¹⁵¹⁰ Concordia argues that:

18 All [the Division] had to do was acknowledge that Sunset [Financial]'s
19 own records reflected approval of Concordia and receipt of commissions
20 from Mr. Albers' sales. Instead, out of fear that this exculpatory
21 evidence could be harmful it strayed from its duty to present the truth,
22 concealed Sunset [Financial] records, presented knowingly false
23 testimony contradicted by the concealed records and then attempted to
24 misleadingly use some of the records before producing them.¹⁵¹¹

25 ¹⁵⁰⁵ Exh. ER-15.

26 ¹⁵⁰⁶ Exh. C-32.

27 ¹⁵⁰⁷ Exh. ER-15.

28 ¹⁵⁰⁸ Tr. at 826-828, 1815-1817; Exh. ER-15.

¹⁵⁰⁹ Concordia Br. at 44.

¹⁵¹⁰ Exh. C-30 at 2077, 2080; Tr. at 1786-1787, 1794-1795.

¹⁵¹¹ Concordia Br. at 45.

1 Concordia further argues that correspondence from Concordia to investors may not have been
 2 disclosed or presented at the hearing for review, with Mr. Clapper admitting that the Division's
 3 investigators may not have: 1) requested documents from Ms. Hodel, or 2) asked investors how much
 4 principal they received back from Concordia.¹⁵¹² Concordia argues that "[f]airness as the floor for due
 5 process will have no meaning if it does not include a full and accurate presentation of evidence" and
 6 that the Commission should reject all of the Division's claims.¹⁵¹³

7 In its Reply Brief, the Division argues that, with "no real defense" to their violations of the Act,
 8 the Respondents instead "attack the Division's integrity."¹⁵¹⁴ The Division contends that the
 9 Respondents provided several investors with flowcharts stating "Product Approved by Kansas City
 10 Life Inc., Broker: Sunset Financial."¹⁵¹⁵ The Division notes that it alleged in the Amended Notice that
 11 Kansas City Life never approved the Concordia investments.¹⁵¹⁶ The Division states that it provided
 12 the Respondents, on March 12, 2015, with a preliminary List of Exhibits that included the flowcharts
 13 and a preliminary List of Witnesses including A. Craig Mason, Jr., of Kansas City Life, who testified
 14 at the hearing.

15 The Division notes that Mr. Mason testified that Kansas City Life had no record or knowledge
 16 of the Concordia investment and Kansas City Life never approved it.¹⁵¹⁷ The Division also states Mr.
 17 Mason testified that Sunset Financial had one registered representative, Mr. Albers, who sold the
 18 Concordia investment to three clients, but Sunset Financial did not approve them for sale.¹⁵¹⁸ Rather,
 19 Sunset Financial learned of the investments when Mr. Albers reported them in his annual compliance
 20 questionnaire and after that Sunset Financial required Mr. Albers to report his investments so that his
 21 outside business activities could be monitored.¹⁵¹⁹

22 The Division states that Mr. Mason testified that Sunset Financial sent to the Division a binder
 23 of documents concerning Concordia.¹⁵²⁰ Concordia moved that both Sunset Financial and the Division

24 ¹⁵¹² Tr. at 1490, 1492.

25 ¹⁵¹³ Concordia Br. at 45-46.

¹⁵¹⁴ Division Reply Br. at 71.

26 ¹⁵¹⁵ Exhs. S-2e, S-11f, S-13g, S-24l, S-110f.

¹⁵¹⁶ See Amended Notice at ¶¶ 61 and 88(c).

27 ¹⁵¹⁷ Tr. at 796-797, 819.

¹⁵¹⁸ Tr. at 796, 798, 812, 818-819.

28 ¹⁵¹⁹ Tr. at 812, 829.

¹⁵²⁰ Tr. at 832-833.

1 be ordered to produce these documents.¹⁵²¹ The Division notes that its counsel stated his belief at the
 2 time, which was erroneous, that the Division had not received a binder from Sunset Financial, but that
 3 the Division had no objection to Mr. Mason providing a copy.¹⁵²² The Division contends that shortly
 4 thereafter, the Division's paralegal checked the Division's electronic file, which showed the Division
 5 probably did have the documents from Sunset Financial, at which time Division's counsel stated that
 6 the Division "may well have that binder that I just stated we didn't – I didn't think we had. If we do,
 7 we will produce it ..."¹⁵²³

8 The Division states that after a brief recess, the Administrative Law Judge inquired about the
 9 binder, to which the Division's counsel replied that, as he told Concordia's counsel, there were a
 10 substantial number of documents that he would review over the lunch break and that he would produce
 11 them to the Respondents as early as the next day.¹⁵²⁴ Contrary to the Respondents' claims of trying to
 12 bury the information from Sunset Financial, the Division argues that the record demonstrates that the
 13 Division's counsel volunteered to produce them to the Respondents.

14 Further, the Division argues that it had no obligation to disclose the documents any sooner. The
 15 Division contends that the Administrative Procedures Act and the Commission's Rules do not require
 16 parties to disclose documents they do not intend to use as exhibits at the hearing. The Division contends
 17 that it did not intend to use the documents and counsel was unaware they even existed prior to Mr.
 18 Mason's testimony. The Division argues that even if counsel had been aware of the documents, the
 19 Division was required to keep them confidential pursuant to the Act's confidentiality statute¹⁵²⁵ and
 20
 21

22 ¹⁵²¹ Tr. at 833.

23 ¹⁵²² Tr. at 833-834.

24 ¹⁵²³ Tr. at 837.

¹⁵²⁴ Tr. at 840-841.

¹⁵²⁵ A.R.S. § 44-2042 provides, in pertinent part:

25 A. The names of complainants and all information or documents obtained by any officer, employee or agent of the
 26 commission, including the shorthand reporter or stenographer transcribing the reporter's notes, in the course of any
 27 examination or investigation are confidential unless the names, information or documents are made a matter of public
 28 record. An officer, employee or agent of the commission shall not make the confidential names, information or documents
 available to anyone other than a member of the commission, another officer or employee of the commission, an agent who
 is designated by the commission or director, the attorney general or law enforcement or regulatory officials, except pursuant
 to any rule of the commission or unless the commission or the director authorizes the disclosure of the names, information
 or documents as not contrary to the public interest.

1 Ethical Rule 1.6.¹⁵²⁶

2 The Division notes that the Respondents have cited no authority for their contention that the
3 Division was under an obligation to disclose what they have characterized as exculpatory evidence.
4 The Division argues that the state has an obligation to disclose exculpatory evidence to defendants in
5 criminal cases pursuant to *Brady*,¹⁵²⁷ but that obligation does not extend to civil enforcement actions
6 such as this.¹⁵²⁸

7 Further, the Division argues that the Respondents, who knew that the Division intended to take
8 testimony from Mr. Mason as early as March 12, 2015, could have contacted Sunset Financial to
9 request the documents or sought a subpoena to obtain them. Moreover, the Division contends the
10 documents were not exculpatory as they never stated Kansas City Life approved the Concordia
11 investments. The Division argues that the documents show Mr. Albers told Sunset Financial that he
12 sold three Concordia investments, with Sunset Financial having approved the investments, and that
13 Concordia paid commissions to Sunset Financial and Mr. Albers.¹⁵²⁹ The Division argues that there is
14 a difference “between Mr. Albers’ telling Sunset [Financial] it had approved those investments and
15 Sunset [Financial] actually approving them.”¹⁵³⁰

16 The Division notes that after Mr. Mason testified, the Division invited the Respondents to recall
17 him for questioning about the documents and that the Division offered, and did, arrange for Mr. Mason
18 to appear for further testimony.¹⁵³¹ The Division notes that when Mr. Mason testified again, he testified
19 consistently with his prior testimony, that Mr. Albers did not sell Concordia investments through Sunset
20 Financial.¹⁵³² The Division states that Mr. Mason testified Sunset Financial accepted the first
21 commission check without a selling agreement for Concordia’s investments because “we didn’t have
22

23 ¹⁵²⁶ ER 1.6 cmt 3 (“The confidentiality rule . . . applies not only to matters communicated in confidence by the client but
24 also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except
as authorized or required by the Rules of Professional Conduct or other law”).

25 ¹⁵²⁷ Citing *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963).

26 ¹⁵²⁸ Citing *Ellsworth v. Baltimore Police Dep’t*, 89 A.3d 1183, 1192 (Md. 2014); *Culver v. Culver*, 360 S.W.3d 526, 536
(Tex. App. 2011); *Alexander v. New York State Div. of Parole*, 654 N.Y.S.2d 835, 836 (App. 1997); *Smigelski v. Dubois*,
100 A.3d 954, 967 (Conn. App. 2014); *Gonzalez v. State Elections Enforcement Comm’n*, 77 A.3d 790, 802 (Conn. App.
2013).

27 ¹⁵²⁹ Exh. ER-15 at ACC011521-ACC011525, ACC011527-ACC011543.

28 ¹⁵³⁰ Division Reply Br. at 76.

¹⁵³¹ Tr. at 1192, 1199-1200.

¹⁵³² Tr. at 1798.

1 good procedures in place.”¹⁵³³ Mr. Mason further testified that following disciplinary actions by
 2 FINRA against Sunset Financial, in 2003 Sunset Financial began to require its representatives to report
 3 investments for which Sunset Financial did not have a selling agreement, like Concordia, and to run
 4 their commissions through the firm, from which Sunset Financial would take a share.¹⁵³⁴ The Division
 5 argues that “whatever this evidence reflects about whether Sunset [Financial] actually ever approved
 6 Concordia’s investments, it does not show that Kansas City Life ever approved them.”¹⁵³⁵

7 The Division contends that the Respondents’ accusation of Division misconduct, for attempting
 8 to impeach Mr. Chris Crowder with some of the Sunset Financial documents, is unwarranted and
 9 hypocritical. The Division notes that “[i]n its List of Witnesses and Exhibits dated October 28, 2012
 10 [sic], Concordia itself reserved ‘the right to use documents not identified above in cross-examination
 11 or rebuttal.’”¹⁵³⁶ The Division argues that the Commission should reject this double standard of
 12 Concordia reserving the right to use undisclosed documents for impeachment while arguing to deny
 13 the same right to the Division.

14 The Division contends that it appropriately used Sunset Financial documents to impeach Mr.
 15 Chris Crowder. The Division argues that Concordia, in its opening statement, claimed to have
 16 voluntarily ceased attempts to raise inventor money since 2008, and that Mr. Chris Crowder testified
 17 to that effect.¹⁵³⁷ The Division notes that Mr. Chris Crowder further testified that he and Mr. Dekmejian
 18 discussed creating another company to raise money from investors, but that the money would not be
 19 used for Concordia.¹⁵³⁸ The Division states that the Sunset Financial documents included an offering
 20 memorandum, sent by Mr. Chris Crowder and Mr. Dekmejian to Sunset Financial, stating “Concordia
 21 through Concordia Funding I, LLC, is currently seeking to raise up to \$10 million in senior secured
 22 financing ... to fund the opportunities in the pre-owned truck finance business over the next two
 23 years.”¹⁵³⁹ The Division further notes that, according to the memorandum, Concordia was to be the

25 ¹⁵³³ Tr. at 1810.

26 ¹⁵³⁴ Tr. at 1809, 1811-1812.

27 ¹⁵³⁵ Division Reply Br. at 77.

28 ¹⁵³⁶ *Id.* at 78.

¹⁵³⁷ Tr. at 41, 1155-1156.

¹⁵³⁸ Tr. at 1157-1158.

¹⁵³⁹ Exh. ER-15 at ACC011559.

1 manager of Concordia Funding.¹⁵⁴⁰ The Division states that a term sheet for the offering read
 2 “Investment Purpose: Concordia Finance, Inc. (‘Concordia’) intends to use the net proceeds to purchase
 3 class 8 truck Sales Contracts.”¹⁵⁴¹ The Division contends that these documents show Concordia
 4 intended to purchase more truck loans and that Mr. Chris Crowder testified falsely when he stated that
 5 Concordia had not sought funds from investors since 2008.

6 The Division further argues that the Sunset Financial documents also reflect material
 7 misrepresentations and omissions by Concordia. The Division notes that the memorandum
 8 misrepresented the “stellar performance” of Concordia’s portfolio,¹⁵⁴² which was contrary to Mr. Chris
 9 Crowder’s testimony that the performance of Concordia’s truck loan portfolio since 2009 was first “in
 10 dramatic freefall” before “slowly [going] sideways.”¹⁵⁴³ The Division further notes that while the
 11 offering memorandum disclosed certain risks of the investment, it did not disclose that Concordia was
 12 on the brink of bankruptcy,¹⁵⁴⁴ as Mr. Chris Crowder testified.¹⁵⁴⁵

13 b) Analysis and Conclusion

14 Concordia argues that the Division’s allegations should be dismissed for violations of its due
 15 process rights arising from the testimony of Mr. Mason and the Division’s failure to disclose documents
 16 received from him. Concordia cites no authority that either specifically supports its allegation that the
 17 Division’s actions constituted misconduct or justifies its requested relief.

18 Concordia’s argument fails for multiple reasons. First, Concordia fails to establish how the
 19 Sunshine Financial documents are exculpatory. By definition, evidence is exculpatory if it tends to
 20 establish a criminal defendant’s innocence.¹⁵⁴⁶ In the Amended Notice, the Division alleged that the
 21 ER Respondents violated the anti-fraud provisions of the Act by misrepresenting that the Concordia
 22 investments were approved by a third-party insurer, i.e., Kansas City Life. While the documents may
 23 be proof that Mr. Albers’ sales of Concordia investments were approved by Sunset Financial, they do
 24 not indicate approval by Kansas City Life.

25 ¹⁵⁴⁰ Exh. ER-15 at ACC011568.

26 ¹⁵⁴¹ Exh. ER-15 at ACC011555.

¹⁵⁴² Exh. ER-15 at ACC011566.

¹⁵⁴³ Tr. at 1156.

¹⁵⁴⁴ Exh. ER-15 at ACC011566-ACC011567.

¹⁵⁴⁵ Tr. at 1155.

28 ¹⁵⁴⁶ *Evidence*, Black’s Law Dictionary (10th ed. 2014).

1 Contrary to Concordia's contentions, the Division did not attempt to "bury" the Sunset
2 Financial documents. The Division argues, and the record confirms, that while the Division's counsel
3 initially was unaware that the Division received documents from Sunset Financial, the Division's
4 counsel promptly discovered his error, corrected himself, volunteered to disclose the documents, and
5 did, in fact disclose them.¹⁵⁴⁷ The Division had no obligation to do so, even if the documents, in fact,
6 proved to be exculpatory, because of the Arizona Court of Appeals holding in *Foor v. Smith*: "where
7 the government does not seek relief unique to its police power, and defendants are provided with
8 adequate discovery and disclosure to mount an effective and meaningful defense, *Brady* will not
9 apply."¹⁵⁴⁸ The *Foor* court found *Brady* applied to civil forfeiture actions where there was no discovery
10 process in place to allow a defendant to obtain at least non-privileged exculpatory and impeachment
11 information in the government's possession.¹⁵⁴⁹ Here, the Respondents were entitled to the discovery
12 allowed under the Administrative Procedure Act and the Commission's Rules, and, therefore, were not
13 entitled to *Brady* disclosures.

14 Concordia cites no authority for the position that the undisclosed documents could not be used
15 by the Division for the impeachment of a witness. The Division used the documents to impeach Mr.
16 Chris Crowder's testimony that Concordia did not seek additional investor funds after 2008. The
17 investments from which the Division's allegations arise all occurred in 2008 or earlier. Even if
18 Division's counsel had been aware of the impeaching documents prior to the hearing, there would have
19 been no reason to use them in the Division's case in chief and, therefore, no reason to disclose them as
20 hearing exhibits. The documents would have remained confidential under A.R.S. § 44-2042(A).

21 Concordia argues that the Division failed to acquire or present documentary evidence from
22 Concordia that was received by Ms. Hodel and potentially other investors. Concordia also argues that
23 the Division failed to present witnesses. Respondents neither direct the manner in which the Division
24 conducts investigations, nor do they determine what witnesses and evidence the Division presents at
25 hearings. The Respondents knew or should have known what documents they sent to investors. The
26

27 ¹⁵⁴⁷ Tr. at 833, 837, 1189.

¹⁵⁴⁸ *Foor v. Smith*, 243 Ariz. 594, 599 ¶ 18, 416 P.3d 858, 863 (App. 2018). We note that the ruling in *Foor* occurred after
28 the hearing in this case.

¹⁵⁴⁹ *Id.*

1 Respondents could have requested documents from the investors or sought to subpoena documents
2 from them pursuant to A.R.S. § 41-1062(A)(4).

3 Having considered the due process violations alleged by the Respondents, we find no error was
4 committed by the Division in either its handling of discovery or its selection of witnesses and
5 documents to present at hearing. Accordingly, the Respondents are entitled to no relief on this basis.

6 B. Classification of the Investments

7 1. Promissory Notes

8 The Division contends that seven promissory notes sold by Concordia were securities. The
9 Division cites A.R.S. § 44-1801(26), which defines “any note” as being a security. The Division
10 contends that Arizona courts apply two different tests to determine whether a note is a security,
11 depending on whether the issue is a violation of registration provisions¹⁵⁵⁰ or a violation of the antifraud
12 provisions of the Act.¹⁵⁵¹ As the Division has alleged only registration violations against Concordia,
13 the Division applies the Arizona Supreme Court’s analysis under *Tober*. The Division relies on the
14 holding in *Tober* that all notes are securities unless an exemption applies.¹⁵⁵²

15 The Division contends that Concordia labeled each of its notes as a “Note” and that these notes
16 provided for payment of 10% or 12% annual interest and a two-year term.¹⁵⁵³ The Division contends
17 that the Concordia notes meet the definition of “any note” and are subject to the registration
18 requirements unless an exemption applies. The Division contends that Concordia, pursuant to its
19 burden under A.R.S. § 44-2033, has failed to present evidence that any exemption applies. As such,
20 the Division concludes that the Concordia notes are securities for purposes of the registration provisions
21 of the Securities Act.

22 While Concordia makes arguments against the Sales and Servicing Contracts being securities,
23 Concordia raises no contentions addressing the seven promissory notes.¹⁵⁵⁴ In its Reply Brief, the
24 Division quotes the Arizona Court of Appeals: “Failure to respond in an answering brief to a debatable

25 ¹⁵⁵⁰ *State v. Tober*, 173 Ariz. 211, 841 P.2d 206 (1992).

26 ¹⁵⁵¹ *MacCollum v. Perkinson*, 185 Ariz. 179, 913 P.2d 1097 (App. 1996).

27 ¹⁵⁵² *Tober*, 173 Ariz. at 213, 841 P.2d at 208.

28 ¹⁵⁵³ Exhs. S-35e, S-35f, S-87e, S-103a, S-105a, S-115e, S-115f.

¹⁵⁵⁴ We note that Concordia has “adopt[ed] and join[ed] the arguments of ER Financial, Bersch and Wanzek in this matter.”
Concordia Br. at 17. However, no allegations have been raised against the ER Respondents arising from the sale of these
seven promissory notes and the ER Respondents have made no contentions regarding these notes.

1 issue constitutes confession of error.”¹⁵⁵⁵

2 The Division correctly states the standard applied by the Arizona Supreme Court with regard
3 to determining whether a note is a security for registration purposes, namely that a note is a security
4 unless otherwise exempted by statute.¹⁵⁵⁶ Concordia has failed to meet its burden of proof to establish
5 that an exemption applies to the promissory notes. Accordingly, we find that the seven promissory
6 notes sold by Concordia are securities for purposes of the registration provisions of the Securities Act.

7 2. Agreements as Investment Contracts

8 The Division contends that the Respondents sold securities in the form of investment contracts.
9 The Division alleges 132 investment contracts are at issue in this case with each contract consisting of
10 (i) a Sales and Servicing Agreement and (ii) an accompanying Custodial Agreement. The Division
11 notes that while Concordia asserted at hearing that the Servicing Agreements and Custodial
12 Agreements were not securities, Concordia admitted those instruments were investment contracts in its
13 Answer, dated July 17, 2015. The Division applies the *Howey*¹⁵⁵⁷ test to conclude that the Respondents
14 offered and sold investment contracts. Pursuant to the *Howey* test, “an ‘investment contract’ arises
15 whenever a person (1) invests money (2) in a common enterprise (3) with an expectation of profits
16 from the efforts of others, and when such third-party efforts are ‘the undeniably significant ones, those
17 essential managerial efforts which affect the failure or success of the enterprise.’”¹⁵⁵⁸

18 a) Investment of Money

19 The Division contends that there is no dispute that the first element of the *Howey* test, the
20 investment of money, has been met. The Division contends that investors issued checks payable to
21 Concordia to purchase the Servicing Agreements and the accompanying Custodial Agreements. The
22 Division contends that Concordia received over \$26.6 million through the sales of these instruments to
23 investors.

24 The Respondents raise no contentions against a finding of an investment of money under the
25 first prong of the *Howey* test.

26 ¹⁵⁵⁵ *Chalpin v. Snyder*, 220 Ariz. 413, 423 ¶ 40 n.3, 207 P.3d 666, 676 (App. 2008).

27 ¹⁵⁵⁶ *Tober*, 173 Ariz. at 213, 841 P.2d at 208.

¹⁵⁵⁷ *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 66 S. Ct. 1100, 90 L. Ed. 1244 (1946).

28 ¹⁵⁵⁸ *Siporin v. Carrington*, 200 Ariz. 97, 101 ¶ 19, 23 P.3d 92, 96 (App. 2001) (quoting *Nutek Info. Sys., Inc. v. Arizona Corp. Comm’n*, 194 Ariz. 104, 108, 977 P.2d 826, 830 (App. 1998)).

1 The evidence of record establishes that Concordia received monetary investments for each of
2 the 132 alleged investment contracts. The first element of the *Howey* test has been met.

3 b) Common Enterprise

4 The Division contends that the second element of the *Howey* test, common enterprise, has been
5 met. The Division notes that in Arizona, the common enterprise test may be met through a finding of
6 either horizontal or vertical commonality.¹⁵⁵⁹

7 “A common enterprise exists when ‘the fortunes of the investor are interwoven with and
8 dependent upon the efforts and success of those seeking the investment or of third parties.’”¹⁵⁶⁰ A
9 common enterprise will be found when either horizontal commonality or vertical commonality
10 exists.¹⁵⁶¹ “Horizontal commonality requires a pooling of funds collectively managed by a promoter
11 or third party” while “[v]ertical commonality requires a direct correlation between the success of the
12 investor and the success of the promoter without a pooling of funds.”¹⁵⁶²

13 i) Horizontal Commonality

14 The Division contends that horizontal commonality exists because Concordia pooled investors’
15 funds in its Chino Commercial Bank account or the bank account it had prior to the Chino Commercial
16 Bank account. The Division contends that Concordia did not segregate each investor’s funds within
17 its bank account and further commingled investors’ monies with those obtained from other sources,
18 including collections from truckers, sales of repossessed trucks and insurance claims. The Division
19 contends that Concordia commingled its profits with the investors’ funds at Chino Commercial Bank.
20 The Division contends that Chris Crowder considered the Chino Commercial Bank account to be a
21 pooled account and those pooled funds were used by Concordia to purchase Conditional Sales
22 Contracts and make interest payments to investors. The Division contends that interest payments to
23 investors did not depend on whether individual truckers paid Concordia the amounts due on the
24 Conditional Sales Contract assigned to a particular investor, because Concordia paid the investor from
25

26 ¹⁵⁵⁹ Division’s Opening Br. at 50, citing *Daggett v. Jackie Fine Arts, Inc.*, 152 Ariz. 559, 566, 733 P.2d 1142, 1149 (App. 1987).

27 ¹⁵⁶⁰ *Vairo v. Clayden*, 153 Ariz. 13, 17, 734 P.2d 110, 114 (App. 1987) (quoting *S.E.C. v. Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476, 482 n. 7 (9th Cir.)).

28 ¹⁵⁶¹ *Vairo*, 153 Ariz. at 17, 734 P.2d at 114.

¹⁵⁶² *Foy v. Thorp*, 186 Ariz. 151, 158, 920 P.2d 31, 38 (App. 1996).

1 other revenue sources if the assigned Contract was not performing.

2 The Respondents argue against a finding of horizontal commonality, stating that under the truck
3 loan contracts, “each lender purchases specific truck loans, not a pool of shared truck loans.”¹⁵⁶³ The
4 Respondents argue that the use of separate bank accounts for each truck loan contract would have been
5 impractical and that the Division has not cited a single case relying on merely a bank account to
6 establish pooling. The Respondents contend that the pooling of profits and losses is the relevant
7 consideration, which did not occur, as was demonstrated by Concordia suffering a book loss in 2006
8 with no lender taking a loss in that year. Further, the Respondents contend that Concordia maintained
9 separate account records for each investor.

10 The Respondents contend that specific truck loans were assigned to each contract and each
11 truck loan contract had separate accounting records. While the Division argues that lenders were paid
12 even when a truck loan defaulted, the Respondents argue that these payments occurred because of the
13 substitute Contract provision, with each lender always having a specific truck loan tied to his or her
14 contract.

15 The Respondents further argue that pooling is determined by the contract, not post-contract
16 practices. The Respondents quote the Arizona Court of Appeals, which held that “what actually
17 occurred, or in speculation what could have occurred, following the transaction is immaterial. The
18 transaction must be characterized at the time when it transpired.”¹⁵⁶⁴

19 In its Reply brief, the Division cites two cases supporting its argument for a finding of horizontal
20 commonality. The Division notes that in *S.E.C. v. SG Ltd.*, horizontal commonality was found when
21 investors’ “funds were pooled in a single account” and “each investor was entitled to receive returns
22 directly proportionate to his or her investment stake.”¹⁵⁶⁵ The Division also cites *S.E.C. v. Deyon*,
23 which found:

24 Horizontal commonality was present because the investors' money was
25 deposited into a single account . . . with each investor to receive 15% or
26 25% of the principal that he deposited. Thus, a pro rata sharing of the

27 ¹⁵⁶³ ER Respondents Br. at 38.

28 ¹⁵⁶⁴ *Daggett v. Jackie Fine Arts, Inc.*, 152 Ariz. 559, 565, 733 P.2d 1142, 1148 (App. 1986).

¹⁵⁶⁵ *S.E.C. v. SG Ltd.*, 265 F.3d 42, 50-51 (1st Cir. 2001).

1 profits was present because each investor would recover an amount in
2 proportion to the principal that he deposited; likewise, each investor
3 would suffer a pro rata loss if the account failed to produce the interest
4 rate that was promised to him at the time he invested.¹⁵⁶⁶

5 The Division contends that here, Concordia commingled investors' funds with monies from
6 other sources,¹⁵⁶⁷ and Concordia's profits were commingled with investor' funds in Concordia's Chino
7 Commercial Bank account. The Division contends that Concordia used these pooled funds to purchase
8 Conditional Sales Contracts and make interest payments to investors. The Division further argues that
9 when an investor's assigned Conditional Sales Contract was not performing, the investor was paid from
10 Concordia's other revenue sources.

11 The Division further contends that the investors each received 10% or 12% annual interest on
12 the principal invested, demonstrating pro rata sharing of profits. The Division also argues that the
13 investors each suffered a pro rata loss of 55% of principal when Concordia imposed the Second
14 Amendment. The Division further notes that the Servicing Agreements make no provision regarding
15 the pooling of investors' funds.

16 The evidence of record establishes that the investors' funds were pooled in Concordia's bank
17 account with Concordia's other funds and then used to buy Conditional Sales Contracts and make
18 interest payments to investors.¹⁵⁶⁸ Interest payments to investors reflected a pro rata share of the profits
19 based on the amount of principal invested, returned at stated amounts of 10% or 12% annually.¹⁵⁶⁹
20 Payments were made to investors regardless of whether assigned individual truck loans were
21 performing.¹⁵⁷⁰ As noted by the Division, the Sales and Servicing Agreements make no comment on
22 how funds are to be held, so pooling cannot be determined by merely reviewing the document. Pooling
23 investor funds in a single bank account was a continuous process, so we need not consider events
24 following the transaction, as *Daggett* instructs. Accordingly, we find that the Division has established
25 horizontal commonality.

26 ¹⁵⁶⁶ *S.E.C. v. Deyon*, 977 F. Supp. 510, 516-517 (D. Me. 1997).

27 ¹⁵⁶⁷ Other sources included collections from truckers, sales of repossessed trucks and insurance claims.

28 ¹⁵⁶⁸ Tr. at 79, 81, 88-89, 96, 98-100, 101-102; Exh. S-165 at 51-52.

¹⁵⁶⁹ Tr. at 168-169.

¹⁵⁷⁰ Tr. at 168.

1 ii) Vertical Commonality

2 The Division contends vertical commonality exists because Concordia's ability to make interest
3 payments and return principal payments to investors relied upon its ability to collect, on a global level,
4 on the underlying truck loans. The Division contends that Concordia's ability to collect on the
5 underlying truck loans depended in part on the quality of its credit checks performed on the truck loan
6 applicants. The Division argues that if too many borrowers defaulted on their truck loans, as happened
7 by 2009, Concordia could not afford to make payments to investors. The Division contends that there
8 is a direct correlation between the success of Concordia, in evaluating loan applications and collecting
9 from borrowers, with the success of investors, in receiving returns on their investments.

10 The Respondents cite *Vairo*, which stated that "vertical commonality requires a positive
11 correlation between the success of the investor and the success of the promoter without a pooling of
12 funds."¹⁵⁷¹ The Respondents note that in *Vairo*, the Arizona Court of Appeals found neither horizontal
13 nor vertical commonality where the investor's profit from full recourse notes was determined by
14 whether the notes were repaid, not by the efforts of the promoter. The Respondents liken the present
15 case to *Vairo*, arguing that the lender is successful if the trucker repays the loan on his or her truck.

16 The Respondents contend that the fortunes of Concordia and the lenders are not linked as "The
17 lenders essentially had 'first dibs' on funds coming in, with Concordia obligated to provide substitute
18 loans for any that did not perform."¹⁵⁷² The Respondents contend that this practice meant Concordia
19 could take losses without the lenders being impacted, which occurred in 2006. The Respondents argue
20 that, overall, lenders were paid millions of dollars more than they put in while Concordia is near
21 bankruptcy. The Respondents conclude that this result demonstrates that the fortunes of the lenders
22 and Concordia have differed.

23 In its Reply Brief, the Division restates its arguments on vertical commonality from its opening
24 brief. The Division further cites *Daggett* for the proposition that vertical commonality exists where a
25 promoter's "interest does not end upon consummation of the purchase agreement."¹⁵⁷³ The Division
26 notes that the terms of the Servicing Agreements and Custodial Agreements provided for the

27 ¹⁵⁷¹ *Vairo*, 153 Ariz. at 17, 734 P.2d at 114.

28 ¹⁵⁷² ER Respondents Br. at 39.

¹⁵⁷³ *Daggett*, 152 Ariz. at 566, 733 P.2d at 1149.

Respondents to earn ongoing fees. Under the terms of the Servicing Agreement, the “Investor . . . engages and hires Concordia as its servicing agent for all servicing matters related to the Contracts.”¹⁵⁷⁴ Concordia’s fee for servicing the Contract was “to retain, during the entire term of the Contract, (a) all late payment fees, (b) all NSF charges, and (c) all interest and other fees or charges in excess of that amount required to pay Investor a [1.0% or 0.83%] per month return ([12% or 10%] per annum, simple interest) on the then existing principal balance due under the Contracts.”¹⁵⁷⁵ Under the Custodial Agreement, ER Financial received monthly custodial fees,¹⁵⁷⁶ which totaled \$2,529,337 from 2004 through January 2009.¹⁵⁷⁷

The Respondents argue that the investor was successful when the trucker repaid his loan. However, we note that Concordia also reaped success from trucker payments, as most of Concordia’s money was made by keeping the difference between the 30% interest paid by the truckers and the 10 or 12% paid to the investors.¹⁵⁷⁸ Respondents further argue that Concordia took losses in 2006 while the investors did not. However, while Concordia could manage to pay investors in the short-term, this was an unsustainable practice as greater numbers of truck loan defaults led to Concordia being unable to make interest payment to investors by February 2009.¹⁵⁷⁹ The Servicing Agreements and Custodial Agreements granted monthly fees to Concordia and ER Financial that demonstrate an ongoing correlation between the success of the investors and the success of the promoter. Accordingly, we find that vertical commonality has been established.

c) Expectation of Profits from the Efforts of Others

i) Argument

The Division contends that the third element of the *Howey* test, expectation of profits through the actions of others, has been met. The Division argues that in Arizona, the third prong is met when “the efforts made by those other than the investor are the undeniably significant ones, those essential

¹⁵⁷⁴ See, e.g., S-12a at § 6.1.

¹⁵⁷⁵ See, e.g., S-12a at § 6.3.

¹⁵⁷⁶ See, e.g., S-12a at § 6.

¹⁵⁷⁷ Exh. S-169.

¹⁵⁷⁸ Tr. at 583-584.

¹⁵⁷⁹ Tr. at 115-116.

1 managerial efforts which affect the failure or success of the enterprise.”¹⁵⁸⁰

2 The Division contends that the investors had passive roles in the investment while the
3 Respondents provided the managerial efforts that affected the failure or success of the enterprise, as
4 shown by the following:

- 5 • Section 8 of the Servicing Agreement required the investor to
6 acknowledge “the importance of utilizing an experienced servicing
7 agent” for the truckers’ Conditional Sales Contracts, making “the
8 servicing fees to be paid to Concordia . . . fair and reasonable.”¹⁵⁸¹ Chris
9 Crowder testified that Section 8 reflects investor reliance on Concordia’s
10 efforts and experience as a servicing agent to collect the amounts due on
11 the truck loans.¹⁵⁸²
- 12 • Section 6.1 of the Servicing Agreement provided that Concordia would
13 be the “servicing agent for all servicing matters related to the Contracts
14 . . . as if in all respects Concordia remained the owner of the Contracts
15 and had sole authority with respect to the collection and disposition of
16 the Contracts.”¹⁵⁸³
- 17 • Section 6.3 of the Servicing Agreement made “irrevocable” the
18 appointment of Concordia as servicing agent unless (1) Concordia
19 defaulted under the Servicing Agreement and failed to cure within thirty
20 days written notice or (2) Concordia consented to modification, “which
21 consent may be withheld by Concordia for any reason whatsoever
22 without regard to any standard of reasonableness.”¹⁵⁸⁴
- 23 • Section 12.1 of the Servicing Agreement provided that the investor grant
24 to Concordia “an irrevocable power of attorney, coupled with an interest,
25

26 ¹⁵⁸⁰ *Nutek Info. Sys., Inc. v. Arizona Corp. Comm’n*, 194 Ariz. 104, 108 ¶ 18, 977 P.2d 826, 830 (App. 1998) (quoting *S.E.C.*
27 *v. Glenn W. Turner Enters. Inc.*, 474 F.2d 476, 482 (9th Cir. 1973)).

¹⁵⁸¹ See, e.g., Exh. S-12a at § 8.

¹⁵⁸² Tr. at 151-152.

¹⁵⁸³ See, e.g., Exh. S-12a at § 6.1.

¹⁵⁸⁴ See, e.g., Exh. S-12a at § 6.3.

authorizing and permitting Concordia . . . at any time, at Concordia's option, with or without notice to Investor . . . to do any and all things Concordia deems necessary and proper to carry out the purpose(s) of this Agreement."¹⁵⁸⁵ Chris Crowder testified that through this power of attorney provision, investors delegated to Concordia all responsibility to service the underlying Conditional Sales Contracts.¹⁵⁸⁶

- Mr. Bersch and Mr. Wanzek, through ER Financial, were supposed to act as Custodians and maintain the truck titles and Conditional Sales Contracts as collateral for the investors.¹⁵⁸⁷
- Investors did not have any control or input as to which truck loans were assigned to them.¹⁵⁸⁸
- Investors did not have any control or authority to direct Concordia's servicing of the assigned truck loans.¹⁵⁸⁹
- Investors had no role in servicing the truck loans.¹⁵⁹⁰
- The investors depended completely on Concordia to service the truck loans because all authority to do so was vested in Concordia.¹⁵⁹¹

The Division further contends that flow charts given to four investors described the investors' role as simply giving a check to ER Financial and then waiting to receive their monthly returns on their investment.¹⁵⁹²

The Division contends that the First and Second Amendments demonstrate that the investors lacked control of their investments. Specifically, the Division contends that the First Amendment was non-negotiable for the investors;¹⁵⁹³ Concordia threatened to, and did, withhold monthly payments

¹⁵⁸⁵ See, e.g., Exh. S-12a at § 12.1.

¹⁵⁸⁶ Tr. at 152-153.

¹⁵⁸⁷ See, e.g., Exhs. S-12a at §§ 4.1, 4.2, and 4.3, S-12b. See also S-2e, S-11f, S-13g, S-24l, S-110f.

¹⁵⁸⁸ Tr. at 103.

¹⁵⁸⁹ Tr. at 103-104.

¹⁵⁹⁰ Tr. at 133.

¹⁵⁹¹ Tr. at 133.

¹⁵⁹² Exhs. S-2e, S-11f, S-13g, S-110f.

¹⁵⁹³ Tr. at 226, 297, 463, 514, 568.

1 owed to investors to force them to sign the First Amendment,¹⁵⁹⁴ and investors understood if they did
 2 not sign the First Amendment, Concordia would not return any of their principal investment
 3 amounts.¹⁵⁹⁵ The Division contends that Concordia also was not willing to negotiate the Second
 4 Amendment with any investors who did not want to sign it.¹⁵⁹⁶ The Division further notes that
 5 Concordia did not give the investors any consideration in exchange for signing the First and Second
 6 Amendments.¹⁵⁹⁷

7 The Respondents argue that the lenders' profits were "determined by whether the truckers repay
 8 the specific loans with the specified rates of interest" and not dependent upon the profits of Concordia
 9 with the lenders investing in specific loans to truckers, not in the equity of Concordia.¹⁵⁹⁸

10 The Respondents cite several federal court cases for the propositions that interest on a note is
 11 not "profit" or the "efforts of others" under the third prong of *Howey*, and that purchases of loans are
 12 not considered securities.¹⁵⁹⁹ The Respondents further contend that Concordia did not provide
 13 managerial efforts essential to the success or failure of the enterprise. The Respondents cite an Arizona
 14 case, *Foy v. Thorp*, which found that the real estate transaction at issue was not a security even though
 15 one of the sellers managed the property after the transaction.¹⁶⁰⁰ In considering the third prong of
 16 *Howey*, the *Foy* court held that "[t]he property's success or failure is controlled by its ability to attract
 17 tenants willing to pay rent."¹⁶⁰¹ While the "property manager may marginally affect the success of
 18 commercial property, the manager's duties are generally routine, operational tasks that can be
 19 accomplished by any one of a number of competent property managers."¹⁶⁰² The Respondents argue
 20 that Concordia did not manage the truckers and that Concordia's duties as a servicing agent, of
 21

22 ¹⁵⁹⁴ Tr. at 299-302, 330, 516-517; Exhs. S-2k, S-2l.

23 ¹⁵⁹⁵ Tr. at 227, 463, 722-723.

24 ¹⁵⁹⁶ Tr. at 591.

25 ¹⁵⁹⁷ Tr. at 568, 587.

26 ¹⁵⁹⁸ ER Respondents Br. at 39.

27 ¹⁵⁹⁹ ER Respondents Br. at 40, citing *First Citizens Fed. Sav. & Loan Ass'n v. Worthen Bank & Trust Co.*, 919 F.2d 510,
 28 515-516 (9th Cir. 1990); *United American Bank of Nashville v. Gunter*, 620 F.2d 1108, 1115-1119 (5th Cir. 1980); *Union*
Nat'l Bank of Little Rock v. Farmers Bank, 786 F.2d 881, 885 (8th Cir. 1986); and *Kansas State Bank in Holton v. Citizens*
Bank of Windsor, 737 F.2d 1490, 1495 (8th Cir. 1984). Concordia Br. at 15-16, citing *Great W. Bank & Tr. v. Kolb*, 532
 F.2d 1252, 1258 (9th Cir. 1976); *In re Epic Mortg. Ins. Litig.*, 701 F. Supp. 1192, 1247 (E.D. Va. 1988); and *Windsor* 737
 F.2d 1490 at 1495.

¹⁶⁰⁰ *Foy*, 186 Ariz. at 158, 920 P.2d at 38.

¹⁶⁰¹ *Id.*

¹⁶⁰² *Id.*

collecting and forwarding truck loan payments, were similarly routine and therefore do not meet the third prong of the *Howey* test.

The Respondents contend that the Division's argument over lack of control by the lenders is not relevant as control is not a factor in the context of debt or loan participation. The Respondents differentiate the truck loans from equity investments, such as LLC membership interests which were considered by the Arizona Court of Appeals in *Nutek*.¹⁶⁰³

Concordia argues that profits under the *Howey* test are limited to "either capital appreciation resulting from the development of the initial investment . . . or a participation in earnings resulting from the use of investors' funds,"¹⁶⁰⁴ and does not include static interest payments like those received by Concordia contract holders. Concordia also contends that, under *Nutek*, a security will be found when the purchaser "irrevocably" relinquishes his or her authority, cannot exercise it, or is so dependent on the expertise of the manager that he or she has no reasonable alternative to reliance on that person.¹⁶⁰⁵ Concordia argues that while the Servicing Agreement purchasers agreed to Concordia's management, they could request to end that relationship with agreement from Concordia. Concordia notes that while the Servicing Agreement has a provision that consent to such a change "may be withheld" by Concordia, Mr. Crowder testified that Concordia would not refuse a request.¹⁶⁰⁶ Concordia also quotes Mr. Crowder's testimony that an investor could decide to do his or her own collections "[a]nd Concordia couldn't stop them from doing that."¹⁶⁰⁷ Concordia likens this situation to that in *Foy*, where the third prong of *Howey* did not lead to finding a security as the investor retained extensive control of the investment including "the power to manage Broadriver Plaza herself, hire a third party manager, or hire Foy to manage the property."¹⁶⁰⁸

In its reply, the Division argues against the contention that the truckers' efforts determined the investors' profits as the Respondents advertised that "Concordia pays whether it collects or not" on the truck loans.¹⁶⁰⁹ The Division further contends that Chris Crowder testified Concordia paid an

¹⁶⁰³ *Nutek*, 194 Ariz. at 108-110 ¶¶ 19-25, 977 P.2d at 830-832.

¹⁶⁰⁴ *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 852, 95 S. Ct. 2051, 2060, 44 L. Ed. 2d 621 (1975).

¹⁶⁰⁵ *Nutek*, 194 Ariz. at 108-109 ¶ 19, 977 P.2d at 830-831.

¹⁶⁰⁶ Tr. at 869; See, e.g., Exh. S-12a at § 6.3.

¹⁶⁰⁷ Tr. at 104.

¹⁶⁰⁸ *Foy*, 186 Ariz. at 158, 920 P.2d at 38.

¹⁶⁰⁹ Exh. S-110h at ACC011754.

investor's interest payments from other revenue sources if that investor's Conditional Sales Contracts were not performing.¹⁶¹⁰

The Division contends that investors relied upon the managerial skills of Concordia and the ER Respondents. The Division notes that Concordia represented itself as "specializ[ing] in the financial needs of the commercial used truck market."¹⁶¹¹ The Division also quotes Concordia's representation of its personnel which included:

[A] former bank vice president who was in charge of truck loans. He reviews and approves each contract considered by Concordia and keeps on top of collections. Typically, 90% of all accounts are paid at least a week ahead of the due date.¹⁶¹²

The Division contends that the ER Respondents represented the credentials of Mr. Bersch and Mr. Wanzek as certified public accountants.¹⁶¹³ The Division further notes that the ER Respondents represented that: Concordia reported to them;¹⁶¹⁴ they monitored Concordia's financial position;¹⁶¹⁵ they would maintain the collateral;¹⁶¹⁶ and they would review monthly payments and reports to the investors.¹⁶¹⁷

The Division contends that court precedent rebuts Concordia's argument that static interest payments are not profit under *Howey*. The Division argues that the Supreme Court unanimously held in *S.E.C. v. Edwards* that "an investment scheme promising a fixed rate of return can be an 'investment contract' and thus a 'security' subject to the federal securities laws."¹⁶¹⁸ The Division cites further federal caselaw from Circuit Courts and the United States District Court of Arizona that similarly have rejected the argument raised here by Concordia.¹⁶¹⁹

¹⁶¹⁰ Tr. at 170-171.

¹⁶¹¹ Exh. S-11e at ACC004247.

¹⁶¹² Exh. S-11e at ACC004248.

¹⁶¹³ See Exhs. S-2e, S-2f, S-11f, S-110g at ACC011753, S-110h at ACC011755.

¹⁶¹⁴ Exh. S-11f ("CONCORDIA REPORTS TO ER FINANCIAL") (all caps in original).

¹⁶¹⁵ Exh. S-2f ("As in the past, we will continue to monitor the financial condition of Concordia").

¹⁶¹⁶ Exhs. S-2e, S-11f, S-13g.

¹⁶¹⁷ *Id.*

¹⁶¹⁸ *S.E.C. v. Edwards*, 540 U.S. 389, 397, 124 S. Ct. 892, 898–99, 157 L. Ed. 2d 813 (2004).

¹⁶¹⁹ *S.E.C. v. Infinity Group Co.*, 212 F.3d 180, 189 (3rd Cir. 2000) ("[T]he definition of security does not turn on whether the investor receives a variable or fixed rate of return"); *Warfield v. Alaniz*, 569 F.3d 1015, 1024 (9th Cir. 2009) ("After *Edwards*, it is clear that fixed periodic payments of the sort promised in the present case may constitute 'profits' for purposes of the *Howey* test"), *affirming* 453 F. Supp.2d 1118, 1123 (D. Ariz. 2006) ("Despite the Defendants' assertions to the

1 The Division argues that cases cited by the Respondents are inapposite as they involve
 2 commercial loans or loan participations made by banks or saving and loans, while the transactions in
 3 this case involve individual investors who had no experience in making commercial truck loans. The
 4 Division argues that in *Foy*, the court found neither vertical nor horizontal commonality, both of which
 5 are present in this case.¹⁶²⁰ The Division notes that in *Foy*, “[t]he purchase of Broadriver Plaza was
 6 not inextricably linked to the management contract.”¹⁶²¹ Conversely, the Division argues that here,
 7 “the assigned truck loans were inextricably linked to Concordia’s engagement as the servicing
 8 agent.”¹⁶²² The Division notes that Section 6.3 of the Servicing Agreement “provided that Concordia’s
 9 appointment as servicing agent was ‘irrevocable’ unless Concordia defaulted and failed to cure, or (2)
 10 Concordia consented to modify its appointment as the servicing agent, ‘which consent may be withheld
 11 by Concordia for any reason whatsoever without regard to any standard of reasonableness.’”¹⁶²³ The
 12 Division further notes that Section 8 of the Servicing Agreement required that “Concordia be retained
 13 as the servicing agent during the entire term of the Contracts.”¹⁶²⁴ The Division contends that these
 14 terms of the Servicing Agreement refute Concordia’s argument, and Mr. Crowder’s testimony, that
 15 investors could manage their own truck loans. The Division speculates that the terms of the Servicing
 16 Agreement likely led to no investor ever requesting their truck titles to collect on their own.¹⁶²⁵

17 ii) Analysis and Conclusion

18 We differentiate the federal circuit cases relied upon by the Respondents. The cases cited by
 19 the Respondents involved loan participations made by banks or savings and loans,¹⁶²⁶ so-called

20 contrary, there is no reason to distinguish between promises of fixed returns and promises of variable returns for purposes
 21 of the test”) (Internal quotation omitted).

22 ¹⁶²⁰ *Foy*, 186 Ariz. at 158, 920 P.2d at 38.

23 ¹⁶²¹ *Id.*

24 ¹⁶²² Division Reply Br. at 15.

25 ¹⁶²³ *Id.*, quoting e.g., Exh S-12a at § 6.3.

26 ¹⁶²⁴ E.g., Exh S-12a at § 8.

27 ¹⁶²⁵ Tr. at 124-125.

28 ¹⁶²⁶ *First Citizens*, 919 F.2d at 512 (“First Citizens Federal Savings and Loan Association (‘First Citizens’), Worthen Bank and Trust Company (‘Worthen’), and 20 other savings and loan institutions entered into a loan participation agreement (‘Agreement’) in connection with a real estate development”); *Gunter*, 620 F.2d at 1110 (“This is an action for damages arising out of the purchase by plaintiff United American Bank of Nashville (‘United American’) of a participation interest in a loan extended by the Hamilton National Bank of Chattanooga (‘Chattanooga Bank’) to defendants William L. and Camille S. Gunter”); *Farmers Bank*, 786 F.2d at 883 (“This case involves a transaction between two banks related to participation in a note”); *Kan. St. Bank*, 737 F.2d at 1491 (“Appellee The Kansas State Bank in Holton purchased a \$200,000 loan participation certificate from appellant The Citizens Bank of Windsor”); *Kotz*, 532 F.2d at 1260 (note given by corporation to a bank in exchange for 10 month renewable line of credit was not a security); *In re Epic*, 701 F. Supp at 1247

1 “sophisticated lending institutions.”¹⁶²⁷ The intent and expectations of an investor when entering an
 2 agreement are clearly significant in determining whether that agreement is an investment contract or a
 3 loan transaction, as evidenced by a quote from *First Citizens* cited by the Respondents: “First Citizens
 4 provides no evidence that at the time it entered into the Agreement it sought an investment or thought
 5 it was making an investment in Worthen Bank or the borrower rather than entering into a commercial
 6 loan transaction.”¹⁶²⁸ Here, the Servicing Agreement fails to set forth any basis to conclude that one
 7 entering into the agreement would believe he or she is becoming involved in a commercial loan
 8 transaction. Indeed, the words “loan” or “lend” appear nowhere in the Servicing Agreement while the
 9 individual entering the agreement with Concordia is called the “Investor” throughout the document.
 10 Based on the plain language of the Servicing Agreement, it is reasonable to infer that the investors
 11 believed they were entering into investment contracts, not loans.

12 In considering the Respondents’ argument that Concordia’s duties consisted of mere
 13 administrative tasks, we look to the Servicing Agreement. The terms of the Servicing Agreement
 14 provided that Concordia act as servicing agent responsible for “all servicing matters related to the
 15 Contracts, including but not limited to sending monthly invoices to Customers for payment, the
 16 collection of payments, correspondence and telephone communication with any Customer in default,
 17 imposition and collection of late payment fees and NSF check charges, initiation at Concordia’s sole
 18 discretion of all collection decisions, actions and activities, including repossession, retention of
 19 attorneys or collection agents, making repairs to damaged vehicles, reselling repossessed vehicles and
 20 all other matters and decisions relating to the Contracts and the vehicles covered by the Contracts, as
 21 if in all respects Concordia remained the owner of the Contracts and had sole authority with respect to
 22 the collection and disposition of the Contracts.”¹⁶²⁹ Pursuant to the Servicing Agreement, Concordia
 23 also conducted credit checks of the debtors under the truck financing contracts “to determine the
 24 payment risk.”¹⁶³⁰ Under the terms of the Servicing Agreement, Concordia would transfer and assign
 25

26 (mortgage loans and certificates of participation in pools of mortgage loans were sold by defendants to “sophisticated,
 27 federally regulated lending institutions”).

27 ¹⁶²⁷ *First Citizens*, 919 F.2d at 514.

27 ¹⁶²⁸ ER Respondents Br. at 40, quoting *First Citizens*, 919 F.2d at 516.

28 ¹⁶²⁹ See, e.g., Exh. S-12a at § 6.1.

28 ¹⁶³⁰ See, e.g., Exh. S-12a at §§ 1.5, 3.6.

1 substitute contracts for those in default.¹⁶³¹ The Servicing Agreement also contains an investor
 2 acknowledgement wherein, based on fluctuations between the relative strength and weaknesses of
 3 individual truck drivers as customers, the investor “acknowledges the importance of utilizing an
 4 experienced servicing agent for such Contracts” and requires Concordia to be that agent during the
 5 entire term of the contracts.¹⁶³² We conclude that the tasks of Concordia were more than mere
 6 administrative ones and that the ultimate success or failure of the investments relied upon the
 7 managerial efforts of Concordia.¹⁶³³

8 Concordia’s argument that a static interest rate cannot be considered profit is, as noted by the
 9 Division, contrary to legal precedent. “There is no reason to distinguish between promises of fixed
 10 returns and promises of variable returns for purposes of the [*Howey*] test.”¹⁶³⁴ Accordingly, we reject
 11 Concordia’s argument that a transaction promising a fixed interest rate cannot be a security.

12 We also reject Concordia’s argument that the investors could exercise control of the
 13 investments. “Where the investor retains extensive control over the investment, the transaction is
 14 unlikely to be a security.”¹⁶³⁵ Extensive control was found in *Foy*, where “[i]f at any time, [the investor]
 15 became dissatisfied with her choice of property managers, she had the power to fire that manager and
 16 hire a replacement.”¹⁶³⁶ Here, however, the express terms of the Servicing Agreement prevented an
 17 investor from servicing his or her own truck titles without Concordia defaulting or granting consent,
 18 which could be withheld for any reason.¹⁶³⁷ Control of the investment was held by Concordia, not the
 19 investors.

20 We conclude that Concordia investors would have had an expectation of profits to be attained
 21 through the efforts of others. The third prong of the *Howey* test has been satisfied. Therefore, we find
 22 that the Servicing Agreements, with the accompanying Custodial Agreements, were securities in the
 23

24 ¹⁶³¹ See, e.g., Exh. S-12a at § 3.7.

25 ¹⁶³² See, e.g., Exh. S-12a at § 8.

26 ¹⁶³³ We note that the third prong of the *Howey* test is met when the efforts of others are not those of the promoter, but those
 of some third party. *Daggett*, 152 Ariz. at 566-67, 733 P.2d at 1149-50. Therefore, the third prong of *Howey* would still
 be met, even if the Commission were to accept the Respondents’ argument that the success of the investments relied not
 upon Concordia, but whether the individual truckers repaid their loans.

27 ¹⁶³⁴ *Edwards*, 540 U.S. at 394, 124 S. Ct. at 897.

28 ¹⁶³⁵ *Foy*, 186 Ariz. at 158, 920 P.2d at 38.

¹⁶³⁶ *Id.*

¹⁶³⁷ See, e.g., Exh. S-12a at § 6.3.

1 form of investment contracts.

2 3. Agreements as Notes

3 a) Argument

4 The Respondents argue that *Howey* is not the best test to apply to determine whether the
5 transactions in this case involved the sale of securities. The Respondents argue that a “note,” which is
6 undefined by the Act, is defined under Arizona law as “a contract that evidences the loan and the
7 obligor’s duty to repay.”¹⁶³⁸ The Respondents contend that the truck loan contracts can be considered
8 notes as “they include a specific amount of principal and a specific fixed interest rate.”¹⁶³⁹

9 The Respondents argue that whether a note is a security in Arizona, under the Act’s antifraud
10 statutes, is determined by the United States Supreme Court’s test in *Reves v. Ernst & Young*,¹⁶⁴⁰ adopted
11 in Arizona in *MacCollum v. Perkinson*.¹⁶⁴¹ The Respondents contend that, under *Reves*, a note is not
12 a security if it falls within a list of non-security notes or if it passes the “family resemblance test.” The
13 Respondents contend that the Concordia truck loans fall within one of the listed exceptions to securities,
14 namely “notes secured by a lien on a business or its assets.”¹⁶⁴² The Respondents contend that the truck
15 loan contracts are fully secured by a title lien on the big rig trucks and the borrowers, the truckers, each
16 had their own business as owners-operators of the big rigs.

17 The Respondents contend that even if the Concordia truck loan contracts do not fall within the
18 above exception, they would not be considered a security in application of the four factors of the
19 “family resemblance test.”

20 The first *Reves* factor is “to assess the motivations that would prompt a reasonable seller and
21 buyer to enter into [the transaction].”¹⁶⁴³ The Respondents argue that “the proceeds were not used for
22 Concordia’s general business purposes, but to fund specific loans to truckers.”¹⁶⁴⁴ The Respondents
23 contend that the loans are for the purchase and sale of an asset and for a commercial purpose, making
24 it more likely that the truck loans are not securities.

25 ¹⁶³⁸ *Hogan v. Washington Mut. Bank, N.A.*, 230 Ariz. 584, 587 ¶ 10, 277 P.3d 781, 784 (2012).

26 ¹⁶³⁹ ER Respondents Br. at 32.

¹⁶⁴⁰ *Reves v. Ernst & Young*, 494 U.S. 56, 110 S. Ct. 945, 108 L. Ed. 2d 47 (1990).

27 ¹⁶⁴¹ *MacCollum v. Perkinson*, 185 Ariz. 179, 913 P.2d 1097 (App. 1996).

¹⁶⁴² *Id.*, at 185 Ariz. at 187, 913 P.2d at 1105.

¹⁶⁴³ *Reves*, 494 U.S. at 66, 110 S. Ct. at 951.

28 ¹⁶⁴⁴ ER Respondents Br. at 34.

1 The second *Reves* factor is the plan of distribution. The Respondents argue that the Amended
 2 Notice alleges 137 truck loans over a period of 125 months, a relatively slow pace of about one per
 3 month.¹⁶⁴⁵ The Respondents contend that the Concordia truck loans were available only during specific
 4 windows of time.¹⁶⁴⁶ The Respondents further argue that the loans were offered only to sophisticated
 5 individuals, primarily accredited investors. The Respondents contend that there was no market for
 6 common trading of the truck loan contracts and resale was prohibited without giving Concordia 90
 7 days to repurchase the contract.¹⁶⁴⁷ The Respondents note that there was no testimony at the hearing
 8 that any sales were made to third parties. Accordingly, the Respondents contend the second factor also
 9 points against the contracts being securities.

10 The third *Reves* factor is the reasonable expectations of the investing public. The Respondents
 11 argue that the contracts were neither marketed as securities nor sold through traditional brokerage
 12 firms, except for a small few that were sold through Sunset Financial, who did not register them. The
 13 Respondents note that the contracts were not sold as “stocks,” “bonds,” or under any similar term. The
 14 Respondents contend that “Concordia, its lawyers, its auditors, its bank, and its financial advisors all
 15 treated the contracts as not being securities.” Therefore, the Respondents conclude that the third factor
 16 points against the contracts being securities.

17 The fourth *Reves* factor is whether some risk-reducing factor would render application of the
 18 Act unnecessary. The Respondents note that risk-reducing factors have been found when the note is
 19 collateralized, insured or otherwise secured.¹⁶⁴⁸ Here, the Respondents argue that each truck loan
 20 contract was fully secured by the title liens on each big rig truck. Although the value of the collateral
 21 later dropped, the Respondents claim that there was 100% collateral at the time of sale. The
 22 Respondents contend that, in the prior case of *Shadow Beverages*, the Commission relied on the
 23 existence of collateral in determining that some notes were not securities.¹⁶⁴⁹ The Respondents argue
 24 that in *Shadow Beverages*, the Commission gave little weight to personal guaranties of the notes at

25 ¹⁶⁴⁵ Amended Notice at ¶¶ 83, 86, 88.

26 ¹⁶⁴⁶ Tr. at 176-178, 1630-1631.

27 ¹⁶⁴⁷ See, e.g., Exh. S-12a at § 7.1.

28 ¹⁶⁴⁸ ER Respondents Br. at 35, citing *Reves*, 494 U.S. at 69, 110 S. Ct. at 953; *MacCollum*, 185 Ariz. at 188, 913 P.2d at 1106; *Bass v. Janney Montgomery Scott, Inc.*, 210 F.3d 577, 585 (6th Cir. 2000).

¹⁶⁴⁹ ER Respondents Br. at 35-36, citing *In the Matter of Shadow Beverages and Snacks, LLC* (Docket No. S-20948A-15-0422, Decision No. 76155 (June 22, 2017)).

1 issue based on an analysis of the “economic realities” of the worth of those guaranties, but here,
2 Concordia replaced nonperforming truck loans pursuant to the terms of the Sales of Contracts and
3 Servicing Agreement.¹⁶⁵⁰ The Respondents contend that the combination of the title liens and the
4 substitute contract provision provided substantial risk reduction, strongly pointing the fourth factor
5 towards the truck loan contracts not being securities.

6 The Respondents conclude that the truck loan contracts are not securities under *Reves* as they
7 either meet an established exception for notes secured by a lien on its business or its assets, or they
8 meet all four factors for an exception under the family resemblance test. The Respondents further
9 contend that the notes are not securities for registration purposes either. The Respondents quote
10 *MacCollum*:

11 The securities fraud statute defines a security in even broader terms than
12 do the registration statutes. The definition of a security for purposes of
13 registration is limited by the statutory language of A.R.S. section 44–
14 1801(22)¹⁶⁵¹ and the specified statutory exemptions. The securities fraud
15 statute, however, includes the sale of even those securities that are
16 exempted from the registration requirements.¹⁶⁵²

17 The Respondents argue that if the truck loan contracts are not securities under the broader antifraud
18 definition, then they are not securities under the narrower registration definition.

19 The Division contends that the Respondents’ use of the term “Concordia truck loan contracts”
20 conflates the Concordia Servicing Agreements with the underlying truck loan contracts (Conditional
21 Sales Contracts). The Division notes that the Servicing Agreements were between Concordia and the
22 investors; the truckers were not a party to these agreements and the investors were not a party to the
23 truck loans.

24 The Division disputes the Respondents’ assertion that the Servicing Agreements were fully
25 secured by title liens with 100% collateral. The Division notes that Ken Crowder, in his examination
26 under oath, testified that sometimes Concordia could not cover an investor’s full investment, so a record

27 ¹⁶⁵⁰ See, e.g., Exh. S-12a at § 3.7.

28 ¹⁶⁵¹ Now A.R.S. § 44-1801(27).

¹⁶⁵² *MacCollum*, 185 Ariz. at 186, 913 P.2d at 1104.

1 of a shortfall would be kept until it could be replaced with a contract.¹⁶⁵³ The Division further notes
 2 that the vehicle lien titles were in Concordia's name, never in the investors' names, so while investors
 3 could potentially become the lienholder, their investment was never actually secured.¹⁶⁵⁴

4 The Division notes that the *Reves* family resemblance test, adopted in Arizona in *MacCollum*,
 5 begins with the presumption that every note is a security.¹⁶⁵⁵ The Division states that this presumption
 6 may only be rebutted if the Respondents show that the note bears a strong resemblance, through
 7 considering four specified factors, to a list of instruments that are not securities, or if those factors
 8 establish a new category of instrument that should be added to the list. The Division quotes *Reves* for
 9 including on the list "the short-term note secured by a lien on a small business or some of its assets."¹⁶⁵⁶
 10 The Division highlights the phrase "short-term" in this quote from *Reves*, which does not appear in
 11 *MacCollum*'s description of the test,¹⁶⁵⁷ that the Court of Appeals quoted from *Tober*'s paraphrasing
 12 of *Reves*.¹⁶⁵⁸ The Division notes that the underlying truck loans had three-year terms¹⁶⁵⁹ while the
 13 Servicing Agreements continued indefinitely until Concordia imposed the First Amendment in 2009.
 14 The Division argues that even if the Concordia investments are considered notes, they are not short-
 15 term notes and, therefore, they do not qualify as an exception under *Reves*. The Division further
 16 contends that none of the *Reves* factors favor a finding of the investments as not securities.

17 The Division notes that under the first *Reves* factor, the instrument is likely a security when the
 18 seller's purpose is to raise money for general business use or to finance substantial investments and the
 19 buyer is primarily interested in the profit expected from the note. The Division argues that this first
 20 factor is heavily in favor of finding the Concordia investments to be securities because: Concordia's
 21 business was purchasing truck loans from big rig dealers and collecting the payments;¹⁶⁶⁰ Concordia
 22 sought capital from investors to obtain more truck loans and service them;¹⁶⁶¹ and investors wanted to
 23

24 ¹⁶⁵³ Exh. S-163 at 75.

25 ¹⁶⁵⁴ Exh. S-180 at 29-30.

¹⁶⁵⁵ *Reves*, 494 U.S. at 65, 110 S. Ct. at 951.

26 ¹⁶⁵⁶ *Id.*

¹⁶⁵⁷ *MacCollum*, 185 Ariz. at 187, 913 P.2d at 1105.

27 ¹⁶⁵⁸ *Tober*, 173 Ariz. at 212 n.3, 841 P.2d at 207.

¹⁶⁵⁹ Exh. S-110g at ACC011750, S-193 at ACC015216.

¹⁶⁶⁰ Amended Notice at ¶ 10; Concordia's Amended Answer at ¶ 10; Tr. at 70; Exh. S-11e.

28 ¹⁶⁶¹ Amended Notice at ¶ 10; Concordia's Amended Answer at ¶ 10; Exhs. S-11e, S-163 at 26-27.

1 generate a stream of income and profit.¹⁶⁶² While the Respondents' assert that proceeds were used for
 2 specific loans to truckers and not to fund Concordia's general business purposes, the Division cites
 3 Chris Crowder's testimony stating that Concordia used the investors' principal to operate its business,
 4 purchase more loans, and pay overhead.¹⁶⁶³ Further, the Division notes that Concordia did not use an
 5 investor's money to fund specific loans, but rather Concordia assigned truck loans to investors from
 6 Concordia's existing inventory of loans.¹⁶⁶⁴

7 The Division argues that the second *Reves* factor, plan of distribution, supports a finding that
 8 the Servicing Agreements and Custodial Agreements are securities. The Division contends that offers
 9 and sales to a broad segment of the public will establish common trading of an instrument,¹⁶⁶⁵ with
 10 courts finding common trading when individuals, as opposed to financial institutions, have been
 11 solicited.¹⁶⁶⁶

12 The Division notes that the Respondents sold 132 investments consisting of a Servicing
 13 Agreement and an accompanying Custodial Agreement.¹⁶⁶⁷ The Division contends these sales were
 14 made to individual investors, not financial institutions, mostly residing in Arizona, although twenty
 15 investors had addresses in other states, including Colorado, Hawaii, North Carolina, Oregon,
 16 Washington, Georgia, Arkansas, New Mexico, and Texas.¹⁶⁶⁸ The Division notes that the investors
 17 included a retired deputy sheriff,¹⁶⁶⁹ a retired respiratory therapist,¹⁶⁷⁰ a retired firefighter,¹⁶⁷¹ and a
 18 retired mechanical salesman.¹⁶⁷² The Division contends that the protections of securities laws would
 19 have benefitted the investors in this case.

20 The Division contends the third *Reves* factor, the reasonable expectations of the investing
 21 public, supports finding the Servicing Agreements and Custodial Agreements to be securities. The

22 ¹⁶⁶² Tr. at 214 (Luhr), 279-280 (LeMay), 453-454 (Hatch), 501-502 (Dennison), 710-711 (Patricola).

23 ¹⁶⁶³ Tr. at 158-159; Exh. S-165.

24 ¹⁶⁶⁴ Exhs. S-163 at 75, 80, S-110h ("Concordia Finance buys Conditional Sales Contracts. These are then packaged and sold to the investor under a Sales and Service Agreement").

25 ¹⁶⁶⁵ *MacCollum*, 185 Ariz. at 187, 913 P.2d at 1105.

26 ¹⁶⁶⁶ *Stoiber v. S.E.C.*, 161 F.3d 745, 751 (D.C. Cir. 1998); *S.E.C. v. Glob. Telecom Servs., L.L.C.*, 325 F. Supp. 2d 94, 115 (D. Conn. 2004) (plan of distribution factor met when notes were sold to five individuals).

27 ¹⁶⁶⁷ See Exh. ALJ-1.

28 ¹⁶⁶⁸ Exh. ALJ-2 at Stipulation No. 2.

¹⁶⁶⁹ Tr. at 201 (Luhr).

¹⁶⁷⁰ Tr. at 265 (LeMay).

¹⁶⁷¹ Tr. at 444 (Hatch).

¹⁶⁷² Tr. at 496 (Dennison).

1 Division contends that the Concordia Servicing Agreements and Custodial Agreements were promoted
 2 as investments by the Respondents who distributed a brochure titled “Concordia Finance: Investing in
 3 Transportation,” describing the “Investment Opportunity” and comparing the returns from Concordia
 4 to that of the Dow Jones Industrial Average.¹⁶⁷³ The Division further notes that the Servicing
 5 Agreements and the Custodial Agreements both defined the individual entering the agreements as the
 6 “Investor.”¹⁶⁷⁴

7 The Division contends that the fourth *Reves* factor, the presence or absence of risk-reducing
 8 factors, supports finding the Servicing Agreements and Custodial Agreements to be securities. The
 9 Division notes that there is no regulatory scheme that would reduce the risk of the Concordia
 10 investments rendering application of the Act unnecessary. While the Respondents’ argue that the
 11 trucks and the substitution clause of the Servicing Agreements served as collateral, the Division restates
 12 that the vehicle titles were in Concordia’s name,¹⁶⁷⁵ so Concordia was collateralized, but not the
 13 investors. Furthermore, the Division contends that the title liens and substitute contract provision failed
 14 to protect the investors from the First Amendment, where Concordia eliminated the investors’ interest
 15 payments, or the Second Amendment, where Concordia wrote off 55% of the investors’ principal. The
 16 Division further notes that in November 2010, Concordia instructed ER Financial to return the vehicle
 17 titles to it,¹⁶⁷⁶ which Mr. Wanzek did,¹⁶⁷⁷ even though written authorization of the investors, required
 18 by Section 4.3 of the Servicing Agreement,¹⁶⁷⁸ was never obtained.¹⁶⁷⁹

19 b) Analysis and Conclusion

20 As stated above, under *Tober*, a note is a security for registration purposes unless otherwise
 21 exempted by statute.¹⁶⁸⁰ Therefore, if the Servicing Agreements and Custodial Agreements are
 22 considered notes, they are securities, for registration purposes, unless exempt under the Act. We
 23 specifically consider the applicability of exemptions in a separate section, *infra*.

24
 25 ¹⁶⁷³ Exhs. S-11e, S-13f, S-110e, S-189.

26 ¹⁶⁷⁴ See, e.g., Exhs. S-12a, S-12b.

27 ¹⁶⁷⁵ Exh. S-180 at 29-30.

28 ¹⁶⁷⁶ Tr. at 1650-1651; Exh. S-161 at ¶ 4.

¹⁶⁷⁷ Exh. S-161 at ¶ 4.

¹⁶⁷⁸ See e.g., Exh. S-12a at § 4.3.

¹⁶⁷⁹ Tr. at 1654.

¹⁶⁸⁰ *Tober*, 173 Ariz. at 213, 841 P.2d at 209.

When analyzing a note in terms of whether it is a security for the purposes of the antifraud provisions of the Act, the Arizona Court of Appeals has adopted the “family resemblance” test,¹⁶⁸¹ which was used under federal securities law by the United States Supreme Court in *Reves v. Ernst & Young*, 494 U.S. 56, 110 S. Ct. 945, 108 L.Ed.2d 47 (1990). The test begins with the presumption that every note is a security.¹⁶⁸² This presumption can be rebutted if a review of four factors establishes a “family resemblance” to a list of instruments that are not securities, or if those factors establish a new category of instrument that should be added to the list.¹⁶⁸³ This list of notes “that are not securities includes the note delivered in consumer financing, the note secured by a mortgage on a home, the short-term note secured by a lien on a small business or some of its assets, the note evidencing a ‘character’ loan to a bank customer, short-term notes secured by an assignment of accounts receivable, or a note which simply formalizes an open-account debt incurred in the ordinary course of business” as well as “notes evidencing loans by commercial banks for current operations.”¹⁶⁸⁴ The four factors considered are: 1) the motivations prompting a reasonable buyer and seller to enter the transaction; 2) the plan of distribution of the instrument to determine if it is an instrument subject to common speculation or investment; 3) the reasonable expectations of the investing public; and 4) whether some risk-reducing factor, such as the existence of another regulatory scheme, would render application of the Securities Act unnecessary.¹⁶⁸⁵ We may also consider the notes in light of the economic realities of the transaction.¹⁶⁸⁶

We first consider the Respondents’ argument that the Servicing Agreements and Custodial Agreements are specifically excluded from being securities because they are notes secured by a lien on a business or its assets. As the Division points out, this example of a note which is not a security is presented in *Reves* as being a short-term note, while *MacCollum*, which the Respondents cite, omits the phrase “short-term.”¹⁶⁸⁷ However, we find nothing in the *MacCollum* decision that indicates the

¹⁶⁸¹ *MacCollum*, 185 Ariz. at 187, 913 P.2d at 1105.

¹⁶⁸² *Reves*, 494 U.S. at 65, 110 S. Ct. at 951.

¹⁶⁸³ *Id.* Since both inquiries involve application of the same four-factor test, they “essentially collapse into a single inquiry.” *S.E.C. v. Wallenbrock*, 313 F.3d 532, 537 (9th Cir. 2002).

¹⁶⁸⁴ *Reves*, 494 U.S. at 65, 110 S. Ct. at 951 (citations omitted).

¹⁶⁸⁵ *Reves*, 494 U.S. at 66-67, 110 S. Ct. at 951-952; *MacCollum* 185 Ariz. at 187-188, 913 P.2d at 1105-1106.

¹⁶⁸⁶ *Wallenbrock*, 313 F.3d at 538.

¹⁶⁸⁷ *Reves*, 494 U.S. at 65, 110 S. Ct. at 951; *MacCollum* 185 Ariz. at 187, 913 P.2d at 1105.

1 Arizona Court of Appeals, in adopting the test in *Reves*, intended to modify the test. The Servicing
 2 Agreements here were not “short-term” as they stated no set period of time, but rather they were
 3 ongoing until the First Amendment ceased the payment of interest to the investors and began monthly
 4 repayments of principal, implicitly imposing an end of the investment upon full return of the principal.
 5 Accordingly, we find that the Servicing Agreements and Custodial Agreements do not meet one of the
 6 specified types of notes excluded from being securities under *Reves*.

7 We next consider the four *Reves* factors to determine if the Servicing Agreements and Custodial
 8 Agreements bear a family resemblance to the instruments that would not be considered securities.
 9 Under the first factor, a note is more likely a security “[i]f the seller’s purpose is to raise money for the
 10 general use of a business enterprise or to finance substantial investments and the buyer is interested
 11 primarily in the profit the note is expected to generate.”¹⁶⁸⁸ Conversely, a note is less likely to be a
 12 security “[i]f the note is exchanged to facilitate the purchase and sale of a minor asset or consumer
 13 good, to correct for the seller’s cash-flow difficulties, or to advance some other commercial or consumer
 14 purpose.”¹⁶⁸⁹

15 The Respondents argue that investments were not used for general business purposes but were
 16 used to fund specific loans to truckers. However, the truck loans that were assigned to investors were
 17 not directly purchased with investor funds, but came from Concordia’s inventory of truck loans.¹⁶⁹⁰
 18 Investor funds were placed in Concordia’s bank accounts where they were used to purchase more
 19 Conditional Sales Contracts, make payments to investors, and pay for general business overhead
 20 costs.¹⁶⁹¹ The purchase of Conditional Sales Contracts was a source of funding for Concordia as the
 21 truckers generally paid interest of 30% while Concordia paid investors 10 to 12%.¹⁶⁹² Concordia’s use
 22 of investor funds demonstrates that Concordia’s purpose of selling the Servicing Agreements was to
 23 raise money for Concordia’s general use in its business enterprise. Meanwhile, purchasers of the
 24 Servicing Agreements testified that they were motivated by the interest they expected to receive.¹⁶⁹³

25 ¹⁶⁸⁸ *Reves*, 494 U.S. at 66, 110 S. Ct. at 951-952.

26 ¹⁶⁸⁹ *Reves*, 494 U.S. at 66, 110 S. Ct. at 952.

27 ¹⁶⁹⁰ Exhs. S-163 at 75, 80, S-110h (“Concordia Finance buys Conditional Sales Contracts. These are then packaged and
 sold to the investor under a Sales and Service Agreement”).

28 ¹⁶⁹¹ Tr. at 96, 98-100, 101-102, 158-159; Exh. S-165 at 51-52, 71.

¹⁶⁹² Tr. at 583-585.

¹⁶⁹³ Tr. at 214 (Luhr), 279 (LeMay), 453 (Hatch), 501-502 (Dennison), 710-711 (Patricola), 948-949 (Hodel).

1 The first *Reves* factor weighs in favor of finding that the Servicing Agreements and Custodial
2 Agreements are securities.

3 The second *Reves* factor is the plan of distribution. Offers and sales to a broad segment of the
4 public will establish common trading in an instrument.¹⁶⁹⁴ “If notes are sold to a wide range of
5 unsophisticated people, as opposed to a handful of institutional investors, the notes are more likely to
6 be securities.”¹⁶⁹⁵ However, the number of investors is not dispositive, but must be weighed against
7 the purchasers’ need for the protection of the securities laws.¹⁶⁹⁶ The Respondents argue that they sold
8 about one investment per month to sophisticated investors with no resales to third parties. However,
9 the Respondents sold 132 investments to individual investors, as opposed to financial institutions, with
10 twenty of those sales to investors with addresses in one of ten other states.¹⁶⁹⁷ The Respondents argue
11 the sophistication of the investors, noting that many were business owners and had other types of
12 investments. Other purchasers included a retired deputy sheriff,¹⁶⁹⁸ a retired respiratory therapist,¹⁶⁹⁹
13 a retired firefighter,¹⁷⁰⁰ and a retired vice president for mechanical sales.¹⁷⁰¹ We find that a large
14 number of investments were sold and, while some investors may have been sophisticated, others would
15 have benefitted from the protection of the securities laws. The second factor supports a finding that
16 Concordia’s Servicing Agreements and Custodial Agreements are securities.

17 The third *Reves* factor requires us to consider the reasonable expectations of the investing
18 public. The fundamental essence of a security is its character as an investment.¹⁷⁰² When a note seller
19 calls the note an investment, it is generally reasonable for a prospective purchaser to take the offeror at
20 its word, but when note purchasers are expressly put on notice that a note is not an investment, it is
21 usually reasonable to conclude that the investing public would not expect the notes to be securities.¹⁷⁰³
22 The Servicing Agreement and the Custodial Agreement both identify the party entering the agreement

24 ¹⁶⁹⁴ *Reves*, 494 U.S. at 68, 110 S. Ct. at 953.

¹⁶⁹⁵ *U.S. S.E.C. v. Zada*, 787 F.3d 375, 381 (6th Cir. 2015).

25 ¹⁶⁹⁶ *McNabb v. S.E.C.*, 298 F.3d 1126, 1132 (9th Cir. 2002).

¹⁶⁹⁷ Exhs. ALJ-1, ALJ-2 at Stipulation No. 2.

26 ¹⁶⁹⁸ Tr. at 201 (Luhr)

¹⁶⁹⁹ Tr. at 265 (LeMay).

27 ¹⁷⁰⁰ Tr. at 444 (Hatch).

¹⁷⁰¹ Tr. at 496, 525 (Dennison).

¹⁷⁰² *Reves*, 494 U.S. at 68, 110 S. Ct. at 953.

28 ¹⁷⁰³ *Stoiber v. S.E.C.*, 161 F.3d 745, 751 (D.C. Cir. 1998).

1 with Concordia as the “Investor.”¹⁷⁰⁴ As noted by the Division, the Respondents distributed a brochure
 2 that called the Concordia agreements an “investment opportunity” and, through the use of graphs,
 3 touted their guaranteed returns that can double principal in six years as opposed to the unknown
 4 fluctuations of the Dow Jones Industrial Average over that same time.¹⁷⁰⁵ Mr. Fosseen, who had been
 5 a commercial banker for almost thirty years, testified that he considered the money he put into
 6 Concordia to have been an investment, not a loan.¹⁷⁰⁶ We find that the third factor supports a finding
 7 that Concordia’s Servicing Agreements and Custodial Agreements are securities.

8 The fourth factor requires us to look at risk-reducing factors that would diminish the need for
 9 protection under the Act, such as the presence of other regulatory schemes, collateral or insurance.¹⁷⁰⁷
 10 “[T]he existence of collateral is significant as a risk-reducing factor.”¹⁷⁰⁸ The evidence of record
 11 reveals that the investors had no protection from insurance or an alternative regulatory scheme. The
 12 Respondents argue that the investors were protected by collateral in the title liens on the big rig trucks.
 13 The Respondents further argue that the value of this collateral was even greater because Concordia
 14 would replace nonperforming Conditional Sales Contracts. However, as the Division notes, the title
 15 liens were never in the names of the investors. Once Mr. Wanzek sent the titles back to Concordia in
 16 November 2010, without written permission from the investors, any collateral the investors had was
 17 gone.¹⁷⁰⁹ This result demonstrates the economic reality of the purported collateral, which did nothing
 18 to protect the purchasers. We find that the fourth factor supports a finding that Concordia’s Servicing
 19 Agreements and Custodial Agreements are securities.

20 Under Arizona law, if Concordia’s Servicing Agreements and Custodial Agreements are
 21 considered notes, then they are presumed to be securities. Having considered the family resemblances
 22 test under *Reves*, we conclude that Concordia’s Servicing Agreements and Custodial Agreements do
 23 not resemble instruments on the *Reves* list, and the evidence does not establish that they should be a
 24 category added to that list. Accordingly, we find that if Concordia’s Servicing Agreements and
 25

26 ¹⁷⁰⁴ See, e.g., Exhs. S-12a, S-12b.

¹⁷⁰⁵ Exhs. S-11e, S-13f, S-110e, S-189.

¹⁷⁰⁶ Tr. at 1958, 1988.

¹⁷⁰⁷ *Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1539 (10th Cir. 1993).

¹⁷⁰⁸ *Bass v. Janney Montgomery Scott, Inc.*, 210 F.3d 577, 585 (6th Cir. 2000).

¹⁷⁰⁹ Tr. at 1697.

1 Custodial Agreements are considered notes, rather than investment contracts, they are still securities
2 subject to the antifraud provisions of the Act.

3 4. Exemptions to Registration Requirements

4 The Respondents argue three bases for finding an exemption to the registration requirements.
5 Under A.R.S. § 44-2033, the burden of proof to establish an exemption from registration is borne by
6 the party raising the defense. As noted by the Division, the Arizona Supreme Court has stated that
7 “[b]ecause of the vital public policy underlying the registration requirement, there must be strict
8 compliance with all the requirements of the exemption statute.”¹⁷¹⁰

9 a) Chattel Paper Exemption

10 The Respondents argue that the truck loan contracts are exempt from securities’ registration
11 requirements pursuant to the chattel paper exemption, which provides that the Act’s registration
12 statutes, A.R.S. §§ 44-1841 and 44-1842, do not apply to “[n]otes or bonds secured by a mortgage or
13 deed of trust on real estate or chattels, or a contract or agreement for the sale of real estate or chattels,
14 if the entire mortgage, contract or agreement together with all notes or bonds secured thereby is sold
15 or offered for sale as a unit, except for real property investment contracts.”¹⁷¹¹

16 The Respondents note that the chattel paper exemption has no federal counterpart but is unique
17 to Arizona’s securities laws.¹⁷¹² The Respondents cite the Arizona Court of Appeals in *James F. Blute,*
18 *III, M.D., P.C., Profit Sharing Plan v. Terrazas*, which found a UCC security interest to be the
19 equivalent of a chattel mortgage under A.R.S. § 44-1843(A)(10). The Respondents argue that the title
20 liens on the trucks here are equivalent to the UCC security interest in *Blute*. The Respondents further
21 argue that the “sold or offered for sale as a unit” part of the exemption is satisfied as each truck loan
22 contract applied to a specific truck loan with a fully secured title lien.

23 In its Reply Brief, the Division argues that the Servicing Agreements don’t contain the words
24 “note,” “chattel,” “secured,” “mortgage,” or “deed of trust,” but rather use the term “Investor”
25 throughout. The Division contends that there were no specific truck loans applying to the Servicing
26 Agreements, as the section that was supposed to list the assigned truck loans, “Exhibit A,” was blank

27 ¹⁷¹⁰ *State v. Baumann*, 125 Ariz. 404, 411, 610 P.2d 38, 45 (1980).

28 ¹⁷¹¹ A.R.S. § 44-1843(A)(10).

¹⁷¹² *James F. Blute, III, M.D., P.C., Profit Sharing Plan v. Terrazas*, 166 Ariz. 111, 112, 800 P.2d 977, 978 (App. 1990).

1 on all of the Servicing Agreements.¹⁷¹³ The Division applies some of its previously mentioned
 2 arguments to the chattel paper exemption. The Division argues that the Servicing Agreements were
 3 not always fully secured as Concordia sometimes did not have assignable truck loans to cover an
 4 investor's entire investment.¹⁷¹⁴ The Division distinguishes *Blute*, where the note purchaser received
 5 a security interest in inventory, as opposed to this case where the vehicle titles were never actually in
 6 the investors' names. Lastly, the Division argues that the Servicing Agreements were not "sold or
 7 offered for sale as a unit" with the underlying truck loans not being assigned until after an investor had
 8 already purchased the Servicing Agreement.¹⁷¹⁵

9 We assume, *arguendo*, that the truck liens qualify as a chattel mortgage under A.R.S. § 44-
 10 1843(10). However, as noted by the Division, specific truck loans were not included with the Servicing
 11 Agreement and the Custodial Agreement. Rather, Concordia later assigned truck loans to the
 12 investment from Concordia's inventory. Therefore, "the entire mortgage, contract or agreement
 13 together with all notes or bonds secured thereby" was not sold as a unit to investors, as A.R.S. § 44-
 14 1843(10) requires. Furthermore, the evidence also established that there were sometimes "shortfalls"
 15 when Concordia did not have sufficient assignable truck loans to cover an investor's entire investment.
 16 Since investments were not always fully secured by the truck loans and specific truck loans were not
 17 sold as a unit with the Servicing Agreements and Custodial Agreements, we find that the chattel paper
 18 securities exemption under A.R.S. § 44-1843(10) is inapplicable here.

19 b) SEC Regulation D and A.A.C. R14-4-126

20 i) Argument

21 The Respondents argue that the truck loan contracts are exempt under the "safe harbor"
 22 provided by SEC's Regulation D¹⁷¹⁶ and Arizona's parallel rule, A.A.C. R14-4-126. Specifically, the
 23 Respondents assert the applicability of the exemptions found in Regulation D, Rule 505 and Rule
 24 506(b) and the corresponding Arizona rules. Under Rules 505 and 506(b), and their parallel Arizona
 25 rules, there can be no more than 35 purchasers of the security for the exemptions to apply.¹⁷¹⁷

26 ¹⁷¹³ See, e.g., Exh. S-12a.

27 ¹⁷¹⁴ Exh. S-163 at 75.

28 ¹⁷¹⁵ *Id.*

¹⁷¹⁶ 17 C.F.R. § 230.500 *et seq.*

¹⁷¹⁷ 17 C.F.R. §§ 230.505(b)(2)(ii), 230.506(b)(2)(i); A.A.C. R14-4-126(E)(2)(c), A.A.C. R14-4-126(F)(2)(a).

1 Accredited investors are excluded from the limit of 35 purchasers.¹⁷¹⁸ Under Arizona law, an
 2 accredited investor includes:

- 3 • Any natural person whose individual net worth, or joint net worth with
 4 that person's spouse, at the time of that person's purchase exceeds
 5 \$1,000,000,¹⁷¹⁹ and
- 6 • Any natural person who had an individual income in excess of \$200,000
 7 in each of the two most recent years or joint income with that person's
 8 spouse in excess of \$300,000 in each of those years and has a reasonable
 9 expectation of reaching the same income level in the current year.¹⁷²⁰

10 These Arizona definitions of accredited investor were the same as those under Regulation D until it
 11 was amended, effective February 27, 2012, to exclude the value of a person's primary residence from
 12 his or her net worth.¹⁷²¹ As none of the alleged sales in this case occurred after 2008, the amendment
 13 to the federal definition does not apply here.

14 The Respondents note that Regulation D, Rule 505, and its Arizona counterpart, provide an
 15 exemption for sales in an annual amount of up to \$5 million.¹⁷²² The Respondents contend that
 16 Concordia never sold more than \$5 million in truck loan contracts in any year. The Respondents also
 17 argue that since the hearing testimony revealed "a substantial majority" of the Concordia investors
 18 were accredited investors, "it is more likely than not that no more than 35 non-accredited investors
 19 purchased the truck loan contracts."¹⁷²³

20 The Respondents further contend that Regulation D, Rule 506(b), and its Arizona counterpart,
 21 grant an exemption for the Concordia Servicing Agreements and Custodial Agreements. Rule 506(b),
 22 and its Arizona counterpart, impose no dollar limit on the offer, but the non-accredited investors must
 23 be sophisticated: "Each purchaser who is not an accredited investor either alone or with his purchaser
 24

25 ¹⁷¹⁸ 17 C.F.R. § 230.501(e)(1)(iv); A.A.C. R14-4-126(B)(5)(a)(iv).

26 ¹⁷¹⁹ A.A.C. R14-4-126(B)(1)(e).

27 ¹⁷²⁰ A.A.C. R14-4-126(B)(1)(f).

28 ¹⁷²¹ See Net Worth Standard for Accredited Investors, 76 Fed. Reg. 81793-02 (Dec. 29, 2011).

¹⁷²² 17 C.F.R. § 230.505(b)(2)(i); A.A.C. R14-4-126(E)(2)(b). We note that following amendments to Rule 504, Rule 505 was repealed, effective May 22, 2017. See Exemptions To Facilitate Intrastate and Regional Securities Offerings, 81 Fed. Reg. 83494-01, 83515 (Nov. 21, 2016).

¹⁷²³ ER Respondents Br. at 45.

1 representative(s) has such knowledge and experience in financial and business matters that he is
 2 capable of evaluating the merits and risks of the prospective investment, or the issuer reasonably
 3 believes immediately prior to making any sale that such purchaser comes within this description.”¹⁷²⁴

4 The Respondents contend that each of the non-accredited investors met the standard of sophistication.

5 The Respondents contend that while a Form D was not filed, such a filing is not required to
 6 claim an exemption: “[T]he S.E.C. has explicitly stated that filing a Form D is not a condition to
 7 obtaining an exemption under Rules 504-506.”¹⁷²⁵ The Respondents argue that the Commission
 8 “should follow the SEC’s lead here,”¹⁷²⁶ but, regardless, state registration requirements are preempted
 9 for Federal covered securities.¹⁷²⁷ The Respondents note that a covered security includes any security
 10 released under the private offering exemption, which includes Rule 506 of Regulation D.¹⁷²⁸

11 The Division contends that the Respondents failed to prove exemption from registration
 12 requirements under Regulation D, Rules 505 and 506, and A.A.C. R14-4-126 because they have failed
 13 to prove several elements of the exemptions.

14 The Division contends that the Respondents failed to prove Concordia’s securities were sold
 15 without general solicitation or advertising, a requirement under Rule 505, Rule 506, and A.A.C. R14-
 16 4-126.¹⁷²⁹ The Division quotes a securities law hornbook for the proposition that “[o]ne of the
 17 benchmarks of a general solicitation is contacting potential investors with no previous relationship to
 18 the issuer or persons promoting the offering.”¹⁷³⁰ The Division further notes that general solicitations
 19 include advertisements and other generally directed offers to sell, as well as “contacting a wide variety
 20 of potential purchasers without regard to their wealth or investment sophistication.”¹⁷³¹

21 The Division contends that the Respondents used general solicitation and general advertising
 22 to offer and sell Concordia’s investments. The Division notes that Concordia’s “Investing In
 23 Transportation” brochure advertised that Concordia “Has Contracts Available for Purchase Now,”

24 ¹⁷²⁴ 17 C.F.R. § 230.506(b)(2)(ii); A.A.C. R14-4-126(F)(2)(b).

25 ¹⁷²⁵ *Hamby v. Clearwater Consulting Concepts, LLLP*, 428 F. Supp. 2d 915, 920 (E.D. Ark. 2006). See also Regulation D; Accredited Investor and Filing Requirements, 54 Fed. Reg. 11369-01 (Mar. 20, 1989).

26 ¹⁷²⁶ ER Respondents Br. at 46.

27 ¹⁷²⁷ 15 U.S.C. § 77r(a)(1).

28 ¹⁷²⁸ 15 U.S.C. § 77r(b)(4)(F).

¹⁷²⁹ 17 C.F.R. § 230.502(c), A.A.C. R14-4-126(C)(3).

¹⁷³⁰ Thomas Lee Hazen, 1 *The Law of Securities Regulation* § 4:77 (May 2017 Update).

¹⁷³¹ Division Reply Br. at 29, citing Hazen, 1 *The Law of Securities Regulation* § 4:77.

1 without stating any restrictions upon the eligibility of investors from the general public, thereby making
2 the brochure a general solicitation.¹⁷³²

3 The Division quotes an advertising flyer, titled "Fixed Base Income at 12% - Guaranteed!":

4 Michael Bersch, CPA, is a club member and also on the board of
5 Concordia Finance. He saw the "FELLOW CLUB MEMBERS: SHOW
6 US WHAT YOU'VE GOT!" request in our newsletter and contacted
7 Stephen Seal. As a result, Concordia Finance was an exhibitor at the
8 December meeting in Palm Springs and many of our oxford club
9 members expressed interest and wanted to know more about this
10 opportunity.¹⁷³³

11 The Division notes that the flyer continued by stating that "Concordia invites interested investors to
12 contact them for more information . . . Investor relations is handled by the office in Lake Havasu City,
13 Arizona. You may wish to contact either Michael Bersch, CPA or David Wanzek, CPA . . . "¹⁷³⁴
14 Another flyer stated that "Concordia Finance invites interested investors to contact them for more
15 information."¹⁷³⁵

16 The Division argues that the record contains no evidence to show that these advertising
17 materials were intended to, or did, reach only potential investors having a pre-existing relationship with
18 the Respondents. The Division notes that Mr. Wanzek testified that some people contacted him and
19 invested without having had a prior relationship with him.¹⁷³⁶ The Division also notes that Concordia
20 did not supervise the marketing of its investments by Mr. Bersch, Mr. Wanzek, and ER Financial, and
21 that Chris Crowder had no interest in knowing what they told investors.¹⁷³⁷ Further, the Division
22 contends that Concordia did not use questionnaires to determine if an investor was an accredited
23 investor,¹⁷³⁸ and Concordia did nothing to determine whether investors had the financial wherewithal

25 ¹⁷³² Exhs. S-11e, S-13f, S-110e, S-189.

26 ¹⁷³³ Exh. S-110h at ACC011754.

27 ¹⁷³⁴ *Id.* at ACC011755.

28 ¹⁷³⁵ Exh. S-110g.

¹⁷³⁶ Tr. at 1602.

¹⁷³⁷ Tr. at 93-94, 129-130.

¹⁷³⁸ Tr. at 97.

1 to invest.¹⁷³⁹ The Division concludes that the Respondents engaged in general advertising and
 2 solicitation.

3 The Division contends that the Respondents failed to prove that Concordia took the necessary
 4 steps to prevent resale of the securities, a requirement under Rule 505, Rule 506, and A.A.C. R14-4-
 5 126.¹⁷⁴⁰ The Division notes that federal and Arizona law provide three non-exclusive ways for an
 6 issuer to demonstrate reasonable care to assure purchasers of securities are not underwriters: 1)
 7 reasonable inquiry as to whether purchasers are buying the securities for themselves or others, 2)
 8 written disclosure to investors that the securities have not been registered and they cannot be resold
 9 unless registered or exempt, and 3) placing a legend on the securities that states they have not been
 10 registered and refers to the restrictions on transferability and sale.¹⁷⁴¹ The Division argues that there is
 11 no evidence that Concordia undertook any of these or similar steps to limit resale, but rather, the
 12 Servicing Agreements contain a section discussing the resale of securities.¹⁷⁴²

13 The Division contends that the Respondents failed to prove that Concordia made requisite
 14 financial disclosures to non-accredited investors prior to the sale of its securities, a requirement under
 15 Rule 505, Rule 506, and A.A.C. R14-4-126.¹⁷⁴³ The Division contends that Concordia's sales
 16 constitute an integrated offering over \$7.5 million, which means Concordia was required to provide all
 17 non-accredited investors with a balance sheet and a profit and loss statement, both certified by an
 18 independent public or certified accountant.¹⁷⁴⁴ The Division argues that there is no evidence that all,
 19 or any, of Concordia's non-accredited investors received such documents.

20 The Division contends that the Respondents failed to prove that Concordia investors were all
 21 accredited investors or sufficiently sophisticated as required under Rule 506 and the corresponding
 22 provision of A.A.C. R14-4-126.¹⁷⁴⁵ The Division argues that Concordia did not receive questionnaires
 23 or other materials regarding investors' qualifications and there is no evidence that Concordia did
 24

25 ¹⁷³⁹ Tr. at 96-97.

26 ¹⁷⁴⁰ 17 C.F.R. § 230.502(d), A.A.C. R14-4-126(C)(4).

27 ¹⁷⁴¹ *Id.*

28 ¹⁷⁴² *See, e.g.*, Exh. S-12a at Section 7.

¹⁷⁴³ 17 C.F.R. § 230.502(b)(2)(i)(B), A.A.C. R14-4-126(C)(2)(b).

¹⁷⁴⁴ 17 C.F.R. § 230.502(b)(2)(i)(B)(3), A.A.C. R14-4-126(C)(2)(b)(iv) (A.A.C. R14-4-126(C)(2)(b)(i)(2)(c) prior to September 28, 1999). *See* 15 U.S.C. § 77aa(25), (26).

¹⁷⁴⁵ 17 C.F.R. § 230.502(b)(2)(ii), A.A.C. R14-4-126(F)(2)(b).

1 anything to determine investors' sophistication.¹⁷⁴⁶ Therefore, the Division concludes that Concordia
 2 could not have reasonably believed that all of its non-accredited investors were sophisticated. The
 3 Division further argues that the Respondents do not even know who all of the non-accredited investors
 4 are, essentially conceded in the ER Respondents' brief, and they cannot prove the identity and
 5 sophistication of each non-accredited investor.

6 The Division further contends that among the non-accredited investors identified by the
 7 Respondents, not all of them were sufficiently sophisticated to be capable of evaluating the merits and
 8 risks of the Concordia investment. The Division contends that while Mr. Hoffort had some business
 9 knowledge and experience, he believed Concordia would repay his investment at any time he requested,
 10 even though Concordia was under no such obligation.¹⁷⁴⁷ The Division contends Mr. Luhr also lacked
 11 the requisite level of sophistication: Mr. Luhr had no experience with a business like Concordia;¹⁷⁴⁸
 12 Mr. Luhr had little success in his prior investing experience and invested in Concordia because he
 13 trusted Mr. Bersch;¹⁷⁴⁹ Mr. Luhr mistakenly believed that Concordia was a low-risk investment even
 14 though it offered a 10% interest rate and he generally understood higher interest rates indicate higher
 15 risks;¹⁷⁵⁰ and Mr. Luhr mistakenly believed his Concordia investment was "very liquid" and he could
 16 get his principle back at any time.¹⁷⁵¹

17 ii) Analysis and Conclusion

18 Federal Regulation D, and the corresponding Arizona provisions, provide a safe harbor
 19 exemption from registration requirements for limited offerings. An exemption under Regulation D,
 20 Rule 505 or Rule 506, and the corresponding Arizona rules, is conditioned upon the satisfaction of
 21 general conditions regarding integration of sales, information requirements, limitations on the manner
 22 of offering, and limitations on resale.¹⁷⁵² Rule 506, and its Arizona counterpart, further impose a limit
 23 of thirty-five purchasers who are not accredited investors, or reasonably believed by the issuer to be
 24

25 ¹⁷⁴⁶ Tr. at 97.

26 ¹⁷⁴⁷ Tr. at 2091-2092, Exh. S-152a.

27 ¹⁷⁴⁸ Tr. at 212.

28 ¹⁷⁴⁹ *Id.*

¹⁷⁵⁰ Tr. at 208-209, 236.

¹⁷⁵¹ Tr. at 205.

¹⁷⁵² 17 C.F.R. §§ 230.502, 230.505(b)(1), 230.506(b)(1), A.A.C. R14-4-126(C).

1 accredited investors.¹⁷⁵³

2 The Division contends that several of the exemption requirements have not been established by
3 the Respondents. Specifically, the Division contends that the Respondents did not satisfy: prohibitions
4 against general solicitation and advertising, limitations on resale, information requirements, and
5 investor sophistication requirements.

6 The Respondents used written promotional materials that encouraged interested investors to
7 contact them regarding the Concordia investment.¹⁷⁵⁴ Mr. Wanzek kept Concordia handouts in his
8 office to give to persons who asked about Concordia.¹⁷⁵⁵ Mr. Wanzek was contacted by purchasers to
9 invest who had no prior relationship with him, but they had heard about the investment from friends or
10 family.¹⁷⁵⁶ An offering “tends to become public when the promoters begin to bring in a diverse group
11 of uninformed friends, neighbors and associates.”¹⁷⁵⁷ The Respondents have not established that they
12 met the requirements of Regulation D, Rule 505 and Rule 506, and their Arizona counterparts, as to
13 the prohibition on general advertising and general solicitation.

14 The Division further argues that the Respondents did not take the necessary steps to prevent
15 resale of the Concordia securities. The record does not reflect that the Respondents exercised any of
16 the codified examples of reasonable care, or that they engaged in another action to meet this
17 requirement. On the contrary, Section 7 of the Servicing Agreements limits an investor’s resale only
18 by requiring that the investor give Concordia ninety days to exercise a first refusal right to purchase
19 the assigned truck loans, at 95% of the existing principal balance, before the investor can sell to a
20 prospective purchaser.¹⁷⁵⁸ The Respondents have not established that they met the requirements of
21 Regulation D, Rule 505 and Rule 506, and their Arizona counterparts, as to the limitations on resale.

22 The Division contends that the Respondents’ sale of Concordia Servicing Agreements and
23 Custodial Agreements constitute an integrated offering over \$7,500,000, and that the Respondents did
24 not meet the financial statement disclosure information requirement. Under the doctrine of integration,

25
26 ¹⁷⁵³ 17 C.F.R. §§ 230.501(e)(1)(iv), 230.506(b)(2)(i), A.A.C. R14-4-126(B)(5)(a)(iv), A.A.C. R14-4-126 (F)(2)(a).

¹⁷⁵⁴ Tr. at 209, 946-947, 1727-1728; Exhs. S-11e, S-13f, S-110e, S-110h, S-189.

¹⁷⁵⁵ Tr. at 1727-1728; Exh. S-110e.

¹⁷⁵⁶ Tr. at 1602.

¹⁷⁵⁷ Non-Public Offering Exemption, 27 Fed. Reg. 11316 (Nov. 16, 1962).

¹⁷⁵⁸ See, e.g., Exh. S-12a at Section 7.

1 certain seemingly separate transactions are treated as one to determine whether those transactions are
2 covered by an exemption from registration requirements.¹⁷⁵⁹ The doctrine of integration prevents
3 issuers of securities from avoiding registration requirements by breaking offerings into small pieces.¹⁷⁶⁰
4 Five factors are considered in determining whether offers and sales should be integrated for exemption
5 purposes: 1) whether the sales are part of a single plan of financing; 2) whether the sales involve
6 issuance of the same class of securities; 3) whether the sales have been made at or about the same time;
7 4) whether the same type of consideration is being received; and 5) whether the sales are made for the
8 same general purpose.¹⁷⁶¹ The first factor favors integration because all of the Servicing Agreements
9 and Custodial Agreements were sold under a single plan of financing Concordia's business enterprise.
10 The Servicing Agreements and Custodial Agreements purchased by investors were all substantially
11 identical, with a minor variation of either 10% or 12% interest payments, and, therefore, the second
12 factor favors integration. As the alleged sales occurred over a period greater than ten years, the third
13 factor weighs against integration. The same consideration was received for all of the investments, cash,
14 generally in the form of a check payable to Concordia, and, therefore, the fourth factor favors
15 integration.¹⁷⁶² Lastly, the sales were made for the same general purpose, namely for Concordia to
16 purchase additional truck loans and pay for overhead of running its business.¹⁷⁶³ In weighing the five
17 factors, we find integration is appropriate.

18 The integrated offering includes investments totaling over \$26.6M, therefore Concordia needed
19 to provide all non-accredited investors with the financial statement information required for offerings
20 greater than \$7.5M, including an audited balance sheet and profit and loss statement, prior to sale.¹⁷⁶⁴
21 The record includes audited financial statements for Concordia spanning several years.¹⁷⁶⁵ However,
22 the record contains no information as to whether any of these documents were ever provided to
23 Concordia's non-accredited investors. Accordingly, the Respondents failed to establish that they met
24 the requirements of Regulation D, Rule 505 and Rule 506, and their Arizona counterparts, as to

25 ¹⁷⁵⁹ *S.E.C. v. Cavanagh*, 445 F.3d 105, 112 (2d Cir. 2006).

26 ¹⁷⁶⁰ *Donohoe v. Consol. Operating & Prod. Corp.*, 982 F.2d 1130, 1140 (7th Cir. 1992).

27 ¹⁷⁶¹ 17 C.F.R. § 230.502(a), A.A.C. R14-4-126(C)(1)(c).

28 ¹⁷⁶² Tr. at 96.

¹⁷⁶³ Tr. at 158-159; Exh. S-165 at 71.

¹⁷⁶⁴ 17 C.F.R. § 230.502(b)(1), (b)(2)(i)(B)(3), 15 U.S.C. § 77aa(25), (26), A.A.C. R14-4-126(C)(2)(a), (C)(2)(b)(iv).

¹⁷⁶⁵ Exh. ER-2.

1 information requirements.

2 Lastly, the Division argues that the Respondents did not prove that each Concordia investor
3 was either an accredited investor or a sufficiently sophisticated investor. Rule 506 of Regulation D,
4 and its Arizona counterpart, require that “[e]ach purchaser who is not an accredited investor either
5 alone or with his purchaser representative(s) has such knowledge and experience in financial and
6 business matters that he is capable of evaluating the merits and risks of the prospective investment, or
7 the issuer reasonably believes immediately prior to making any sale that such purchaser comes within
8 this description.”¹⁷⁶⁶ In order to come within the safe harbor of Rule 506, and its Arizona counterpart,
9 the Respondents must present evidence of their reasonable belief as to the nature of each purchaser.¹⁷⁶⁷

10 The Respondents contend that of the eighteen investors who testified at the hearing, eleven
11 were accredited investors and the other seven were sophisticated.¹⁷⁶⁸ Assuming *arguendo* that these
12 eighteen investors were either accredited investors or sophisticated investors, the Division has alleged
13 a total of 132 investment contracts having been sold by the Respondents, including dozens of investors
14 in addition to the eighteen who testified. The record contains no information to determine whether
15 these investors were accredited investors or sophisticated investors. Nor does the record demonstrate
16 that the Respondents took any steps to determine an investor’s qualifications so as to give the
17 Respondents a reasonable belief as to the nature of the purchasers. Therefore, the Respondents have
18 failed to establish they met the requisite condition of purchaser sophistication required by Rule 506
19 and its Arizona counterpart.

20 c) Private Offering Exemption

21 The Respondents contend that Regulation D, like its Arizona counterpart, is a “safe harbor” that
22 is narrower than the statutory exemption from which it is derived. The Respondents argue that Rule
23 506 arises from the exemption of Section 4(a)(2) of the Securities Act of 1933, 15 U.S.C. § 77d(a)(2),
24 that applies to “transactions by an issuer not involving any public offering.”¹⁷⁶⁹

25 The Respondents cite *S.E.C. v. Ralston Purina Co.* in arguing that an offering is not “public”
26

27 ¹⁷⁶⁶ 17 C.F.R. § 230.506(b)(2)(ii). See also A.A.C. R14-4-126(F)(2)(b).

¹⁷⁶⁷ *Mark v. FSC Sec. Corp.*, 870 F.2d 331, 335 (6th Cir. 1989).

¹⁷⁶⁸ ER Respondents Br. at 45, 47-49.

28 ¹⁷⁶⁹ The Arizona counterpart is A.R.S. § 44-1844(A)(1).

1 based on the number of persons involved, rather an offering will be private if it is made “to those who
 2 are shown to be able to fend for themselves.”¹⁷⁷⁰ The Respondents note that the Arizona Court of
 3 Appeals has applied *Ralston Purina* to the Act.¹⁷⁷¹ “[A] limited distribution to highly sophisticated
 4 investors, rather than a general distribution to the public, is not a public offering.”¹⁷⁷²

5 The Respondents contend that this case involved a limited distribution. The Respondents argue
 6 that the truck loan contracts were sold to a limited number of individuals, averaging about one per
 7 month, during limited periods of time.¹⁷⁷³

8 Regarding the sophistication of the offerees, the Respondents contend that “[t]he testifying
 9 witnesses were mostly accredited investors, and many were successful business people or experienced
 10 investors.”¹⁷⁷⁴ The Respondents note that the truck loan contracts were secured by the title liens on the
 11 big rig trucks, which provided additional protection. The Respondents conclude that the truck loan
 12 contracts were secured contracts offered in small numbers to sophisticated individuals and, therefore,
 13 they are part of a private offering.

14 The Division contends that there is no Arizona authority interpreting the Arizona Non-Public
 15 Offering provision, A.R.S. § 44-1844(A)(1), but we may take guidance from federal authority as it is
 16 identical to Section 4(a)(2) of the Securities Act of 1933, codified at 15 U.S.C. § 77d(a)(2).¹⁷⁷⁵ The
 17 Division contends that the federal Non-Public Offering provision exempts only those offerings where
 18 the offerees do not need the protections of a securities registration statute, such as the executive officers
 19 of the issuer. “A court may only conclude that the investors do not need the protection of the [Securities
 20 Act of 1933] if all the offerees have relationships with the issuer affording them access to or disclosure
 21 of the sort of information about the issuer that registration reveals”¹⁷⁷⁶ The Division notes that the test
 22 for the federal Non-Public Offering exemption focuses upon: 1) the number of offerees, 2) the
 23 sophistication of the offerees, 3) the size and manner of the offering, and 4) the relationship of the

24
 25 ¹⁷⁷⁰ *S.E.C. v. Ralston Purina Co.*, 346 U.S. 119, 125, 73 S. Ct. 981, 984, 97 L. Ed. 1494 (1953).

26 ¹⁷⁷¹ *Butler v. Am. Asphalt & Contracting Co.*, 25 Ariz. App. 26, 29, 540 P.2d 757, 760 (1975).

27 ¹⁷⁷² *S.E.C. v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1090–91 (9th Cir. 2010).

28 ¹⁷⁷³ Amended Notice at ¶¶ 83, 86, 88; Tr. at 176-178, 1630-1631.

¹⁷⁷⁴ ER Respondents Br. at 47.

¹⁷⁷⁵ Division Reply Br. at 36, citing Laws 1996, Ch. 197, § 11(C) (Legislature intends that court interpretations of substantially similar federal securities provisions be used as interpretive guide for the Act).

¹⁷⁷⁶ *S.E.C. v. Murphy*, 626 F.2d 633, 647 (9th Cir. 1980).

1 offerees to the issuer.¹⁷⁷⁷

2 However, the Division argues that these factors need not be considered here. “The party
3 claiming the exemption must show that it is met not only with respect to each purchaser, but also with
4 respect to each offeree.”¹⁷⁷⁸ The Division notes that this proof “must be explicit, exact, and not built
5 on conclusory statements.”¹⁷⁷⁹ The Division argues that the record does not establish the number,
6 identity or the sophistication of all Concordia’s offerees and, therefore, the Respondents have failed to
7 prove that the Non-Public Offering exemption applies.

8 In considering the applicability of the exemption in Regulation D, Rule 506, and its Arizona
9 counterpart, *supra*, we found that the Respondents failed to establish the sophistication level for all of
10 the purchasers of the Concordia investment. Further, the Respondents failed to set forth evidence of
11 the total number of offerees, let alone the identity of these offerees. The Respondents have not
12 presented adequate evidence to allow a determination of the offerees’ level of sophistication or their
13 relationship to the Respondents. As such, the Respondents have failed to meet their burden of proof to
14 establish applicability of the Non-Public Offering exemption.

15 C. Within or From Arizona

16 The Division contends that the Respondents offered or sold securities “within or from this
17 state,” an element of violations of A.R.S. §§ 44-1841, 44-1842, and 44-1991(A). The Division
18 contends that the phrase “from this state” includes transactions which do not occur entirely inside
19 Arizona, and it was designed to protect against a base of operations being established in Arizona for
20 the offer and sale of securities to persons outside of the state.¹⁷⁸⁰

21 The Division contends that Concordia admitted in its Answer that it sold promissory notes to
22 Arizona residents in a least five transactions¹⁷⁸¹ and that Concordia sold two more promissory notes to
23 an Arizona investor on March 7, 2001, and May 7, 2005.¹⁷⁸²

24 ¹⁷⁷⁷ *Id.* at 644-645.

25 ¹⁷⁷⁸ *Id.* at 645.

26 ¹⁷⁷⁹ *Johnston v. Bumba*, 764 F. Supp. 1263, 1273 (N.D. Ill. 1991) (internal quotation omitted).

27 ¹⁷⁸⁰ *Chrysler Capital Corp. v. Century Power Corp.*, 800 F. Supp. 1189, 1191 (S.D.N.Y. 1992) (interpreting the Arizona Securities Act).

28 ¹⁷⁸¹ Amended Notice at ¶ 12; Concordia’s Amended Answer at ¶ 12; Exhs. S-87e [Santy Note for \$100,000 dated 9/16/2002], S-35e [Edmonds Note for \$42,000 dated 2/28/2007], S-35f [Edmonds Note for \$208,000 dated 1/10/2007], S-103a [Guest Note dated 11/6/2006 for \$225,000], S-105a [Kollars Note dated 11/6/2006 for \$53,109].

¹⁷⁸² Exhs. S-115a, S-115b, S-115e [Ferris-Spence Note dated 3/7/2001] and S-115f [Ferris-Spence Note dated 5/7/2005].

1 The Division further alleges sales of a total of 132 investment contracts, each including a
 2 Servicing Agreement and a Custodial Agreement, and all of which had ER Financial designated as the
 3 Custodian. The Division contends that ER Financial's role as Custodian meant all 132 investment
 4 contracts, including those sold to non-Arizona residents, were sold "within or from" Arizona because:
 5 ER Financial was an Arizona limited liability company with its principal place of business in Lake
 6 Havasu City, Arizona;¹⁷⁸³ the members of ER Financial, Mr. Bersch and Mr. Wanzek, lived and worked
 7 as accountants in Lake Havasu City, Arizona;¹⁷⁸⁴ and before organizing ER Financial as a limited
 8 liability company, Mr. Bersch and Mr. Wanzek did business as "ER Financial and Advisory
 9 Service."¹⁷⁸⁵

10 The Respondents, in their closing briefs, have not contested the Division's assertion that the
 11 transactions at issue occurred "within or from" Arizona.

12 As noted by the Division, the record establishes that the Concordia promissory notes were sold
 13 to Arizona investors and, therefore, occurred within or from this state. The evidence established that
 14 the investment contracts sold by ER Financial were sales that occurred within or from Arizona as Mr
 15 Bersch, Mr. Wanzek, and ER Financial conducted their business in Arizona. The Division has
 16 established that the securities at issue were sold "within or from this state," as required to find a
 17 violation under A.R.S. §§ 44-1841, 44-1842, and 44-1991(A).

18 D. Registration Violations

19 Under A.R.S. § 44-1841, it is unlawful to sell or offer for sale within or from Arizona any
 20 securities unless those securities have been registered or are exempt from registration. Concordia's
 21 securities have not been registered by the Commission.¹⁷⁸⁶ Under A.R.S. § 44-1842, it is unlawful for
 22 any dealer or salesman to sell or offer to sell any securities within or from Arizona unless the dealer or
 23 salesman is registered. The Respondents were not registered with the Commission as securities dealers
 24 or salesmen.¹⁷⁸⁷ The record does not establish the presence of any exemptions to the registration
 25 requirements.

26 ¹⁷⁸³ Tr. at 1215-1216; Exh. S-166.

27 ¹⁷⁸⁴ Amended Notice at ¶¶ 3 and 4; ER Respondents' Motion and Amended Answer at ¶¶ 3 and 4.

¹⁷⁸⁵ Tr. at 1216; 1909-1910; Exhs. S-24b, S-41b, S-119b, S-123b, S-137b.

¹⁷⁸⁶ Exhs. S-1a-b.

¹⁷⁸⁷ Exhs. S-1a-e.

1 The Division contends that Concordia and ER Financial both violated A.R.S. § 44-1841 with
 2 respect to the 132 investment contracts at issue. The Division further asserts that Concordia also
 3 violated A.R.S. § 44-1841 with respect to the seven promissory notes it sold to Arizona investors. The
 4 Division argues that an action brought under A.R.S. § 44-2032, such as this matter, “may be brought
 5 against any person, including any dealer, salesman or agent, who made, participated in or induced the
 6 unlawful sale or purchase, and such persons shall be jointly and severally liable to the person who is
 7 entitled to maintain such action.”¹⁷⁸⁸ Therefore, the Division contends that Mr. Bersch is jointly and
 8 severally liable with ER Financial for the sixty-three violations of A.R.S. § 44-1841 that he made,
 9 participated in, or induced by signing the Custodial Agreements. The Division contends that Mr.
 10 Wanzek is jointly and severally liable with ER Financial for the fifty-three violations of A.R.S. § 44-
 11 1841 that he made, participated in, or induced by signing the Custodial Agreements.

12 The Division further contends that Concordia violated A.R.S. § 44-1842 by acting as a dealer
 13 in selling securities to investors in Arizona and other jurisdictions through Mr. Bersch, Mr. Wanzek,
 14 and ER Financial.¹⁷⁸⁹ The Division contends that Concordia authorized Mr. Bersch, Mr. Wanzek, and
 15 ER Financial to sell Concordia’s investment contracts, as evidenced by the \$565,485 in commissions
 16 Concordia paid to ER Financial between 2004 and 2008,¹⁷⁹⁰ and the Custodial Agreements signed by
 17 Mr. Bersch and Mr. Wanzek on behalf of ER Financial.¹⁷⁹¹ The Division notes that since the
 18 Respondents have never been registered as securities dealers or salesmen, they each violated A.R.S. §
 19 44-1842 by their respective sales. The Division alleges 139 violations for Concordia (132 investment
 20 contracts and 7 promissory notes) and 132 violations for ER Financial. The Division further alleges
 21 that Mr. Bersch and Mr. Wanzek, pursuant to A.R.S. § 44-2003(A), are jointly and severally liable with
 22

23 ¹⁷⁸⁸ A.R.S. § 44-2003(A).

24 ¹⁷⁸⁹ A.R.S. § 44-1801 provides, in pertinent part:

25 10. “Dealer”:

* * *

26 (b) Means an issuer, other than an investment company, who, directly or through an officer, director, employee or agent
 who is not registered as a dealer under this chapter, engages in selling securities issued by such issuer.

(This subsection was renumbered from A.R.S. § 44-1801(9), effective August 3, 2018. 2018 Ariz. Sess. Laws Ch. 207).

¹⁷⁹⁰ Exh. S-169.

27 ¹⁷⁹¹ A.R.S. § 44-1801 provides, in pertinent part:

28 23. “Salesman” means an individual, other than a dealer, employed, appointed or authorized by a dealer to sell securities in
 this state.

(This subsection was renumbered from A.R.S. § 44-1801(22), effective August 3, 2018. 2018 Ariz. Sess. Laws Ch. 207).

1 E.R. Financial for the violations they made, participated in or induced as evidenced by their signature
2 on 63 and 53 Custodial Agreements, respectively.

3 Concordia asserts that numerous securities professionals approved the Concordia investments,
4 including: Ken Crowder's attorney who spoke with Mr. Bersch and Mr. Wanzek; Sunset Financial, a
5 licensed broker/dealer and a subsidiary of Kansas City Life; Chino Commercial Bank, whose founder
6 and current president is a member of the Federal Reserve Bank of San Francisco; and Concordia's
7 licensed auditors who listed the Servicing Agreements as secured debts or pledged contracts.¹⁷⁹²

8 We infer two basic arguments from Concordia's assertions: 1) that Concordia relied on the
9 opinion of securities professionals in believing that it did not need to comply with registration
10 requirements under the Act, and 2) the Division possessed evidence that the sales of Concordia products
11 were conducted by other entities who were not named as respondents.

12 Assuming Concordia acted in good faith reliance upon the approval of its investment contracts
13 by securities professionals, Concordia's reliance could be a defense only if intent is a necessary element
14 of a registration violation. Neither A.R.S. § 44-1841 nor § 44-1842 contain language requiring a
15 culpable mental state to commit the offense. Under A.R.S. § 13-202(B), a statutory offense that does
16 not set forth a culpable mental state will be one of strict liability.¹⁷⁹³ Since A.R.S. §§ 44-1841 and 44-
17 1842 are strict liability offenses, whether Respondents acted in good faith is irrelevant to determining
18 whether the Respondents violated those statutes.¹⁷⁹⁴

19 Concordia states that "[t]he Division possessed materials demonstrating custodial fees paid to
20 [Sunset Financial and Chino Commercial Bank], yet never included either as respondents."¹⁷⁹⁵
21 Concordia's assertion implies some form of misconduct committed by the Division in its selection of
22 named respondents in this matter. We find nothing in fact or law to support such an allegation. "Our
23

24 ¹⁷⁹² Concordia Br. at 3-5.

¹⁷⁹³ A.R.S. § 13-202 provides, in pertinent part:

25 B. If a statute defining an offense does not expressly prescribe a culpable mental state that is sufficient for commission of
26 the offense, no culpable mental state is required for the commission of such offense, and the offense is one of strict liability
unless the proscribed conduct necessarily involves a culpable mental state. If the offense is one of strict liability, proof of a
culpable mental state will also suffice to establish criminal responsibility.

27 ¹⁷⁹⁴ "[A]dvice of counsel is not a defense to a strict liability violation of the Act. It can, however, be considered by the
Commission as a mitigating factor in determining penalties and sanctions." *In the Matter of Lost Dutchman Investments,*
28 *Inc.*, Decision No. 58259 (April 8, 1993) at 11.

¹⁷⁹⁵ Concordia Br. at 5.

1 legal system has traditionally accorded wide discretion to criminal prosecutors in the enforcement
2 process . . . and similar considerations have been found applicable to administrative prosecutors as
3 well.”¹⁷⁹⁶ The Division has broad discretion in bringing an enforcement action. That other persons or
4 entities could have been named as respondents does not provide a defense to an allegation of
5 registration violations.

6 The evidence of record establishes that Concordia committed 139 violations of A.R.S. §§ 44-
7 1841 and 44-1842 by selling unregistered securities as an unregistered dealer. The record further
8 establishes that ER Financial committed 132 violations of A.R.S. §§ 44-1841 and 44-1842 by selling
9 unregistered securities as an unregistered salesman. Mr. Bersch committed 63 violations of A.R.S. §§
10 44-1841 and 44-1842 by selling unregistered securities as an unregistered salesman. Mr. Wanzek
11 committed 53 violations of A.R.S. §§ 44-1841 and 44-1842 by selling unregistered securities as an
12 unregistered salesman.

13 E. Fraud Violations

14 The Division contends that ER Financial, Mr. Bersch, and Mr. Wanzek engaged in multiple
15 violations of the antifraud provisions of the Securities Act, A.R.S. § 44-1991(A). A.R.S. § 44-1991
16 provides, in pertinent part:

17 It is a fraudulent practice and unlawful for a person, in connection with
18 a transaction or transactions within or from this state involving an offer
19 to sell or buy securities, or a sale or purchase of securities, including
20 securities exempted under section 44-1843 or 44-1843.01 and including
21 transactions exempted under section 44-1844, 44-1845 or 44-1850,
22 directly or indirectly to do any of the following:

- 23 1. Employ any device, scheme or artifice to defraud.
- 24 2. Make any untrue statement of material fact, or omit to state
25 any material fact necessary in order to make the statements
26 made, in the light of the circumstances under which they were
27

28 ¹⁷⁹⁶ *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248, 100 S. Ct. 1610, 1616, 64 L. Ed. 2d 182 (1980) (internal citations omitted).

made, not misleading.

3. Engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit.

An issuer of securities has an affirmative duty not to mislead potential investors.¹⁷⁹⁷ Under A.R.S. § 44-1991(A)(2), a material fact is one that “would have assumed actual significance in the deliberations of the reasonable buyer.”¹⁷⁹⁸ The test does not require an omission or misstatement to actually have been significant to a particular buyer.¹⁷⁹⁹ Materiality will also be found when there is a “substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available.”¹⁸⁰⁰

1. Investor Relations Office

In the Amended Notice, the Division alleged that ER Financial, Mr. Bersch, and Mr. Wanzek violated A.R.S. § 44-1991(A) by representing to offerees and investors that they were Concordia’s “Investor Relations Office” in Lake Havasu City, Arizona, when Concordia had no such office.¹⁸⁰¹ The Division presents no argument supporting this allegation in its Opening Post-Hearing Brief. The ER Respondents contend that this charge was waived as the Division failed to include it in the Division’s brief. The Division, in its Reply Brief, states that it has withdrawn this theory of a violation of A.R.S. § 44-1991(A).¹⁸⁰² Accordingly, we dismiss the allegations of fraud against ER Financial, Mr. Bersch, and Mr. Wanzek arising from the representation of an “Investor Relations Office.”

2. Liquid

a) Argument

In the Amended Notice, the Division alleged that ER Financial, Mr. Bersch, and Mr. Wanzek violated A.R.S. § 44-1991(A) by “[r]epresenting to offerees and investors that their investments in Concordia would be liquid, although Concordia lacked readily-available resources to refund the investors’ principal, Concordia did not intend for the investments to be liquid because it needed the

¹⁷⁹⁷ *Trimble*, 152 Ariz. at 553, 733 P.2d at 1136 (App. 1986).

¹⁷⁹⁸ *Aaron v. Fromkin*, 196 Ariz. 224, 227 ¶ 14, 994 P.2d 1039, 1042 (App. 2000).

¹⁷⁹⁹ *Hirsch*, 237 Ariz. at 464 ¶ 27, 352 P.3d at 933.

¹⁸⁰⁰ *Caruthers v. Underhill*, 230 Ariz. 513, 524 ¶ 43, 287 P.3d 807, 818 (App. 2012) (internal quotations omitted).

¹⁸⁰¹ Amended Notice at 16 ¶ 88(a).

¹⁸⁰² Division Reply Br. at 38.

investors' principal to operate, and the Servicing Agreements restricted the investors' ability to liquidate their investments by selling or assigning the assigned Truck Financing Contracts to third parties."¹⁸⁰³

In its closing brief, the Division alleges that Mr. Bersch and Mr. Wanzek "sold Concordia's securities by misrepresenting that the investor's investment in Concordia would be liquid and/or the investor could get his or her money out."¹⁸⁰⁴ The Division asserts that Mr. Bersch made these misrepresentations to six investors: Mr. Luhr,¹⁸⁰⁵ Ms. LeMay,¹⁸⁰⁶ Mr. Dennison,¹⁸⁰⁷ Ms. Patricola,¹⁸⁰⁸ Ms. Fuhrman,¹⁸⁰⁹ and Hospice of Havasu.¹⁸¹⁰ The Division asserts that Mr. Wanzek made these misrepresentations to six investors: Mr. Hatch,¹⁸¹¹ Mr. McCowan,¹⁸¹² Mr. and Mrs. Martin,¹⁸¹³ Mr. Roth,¹⁸¹⁴ Mr. Bronsart,¹⁸¹⁵ and Mr. Peters.¹⁸¹⁶

The ER Respondents contend that the claims in the Amended Notice are baseless. The ER Respondents argue that liquidity does not require funds being available to immediately refund all the contracts. The ER Respondents argue that "the financial definition of liquidity is 'the degree to which an asset or security can be quickly bought or sold in the market without affecting the asset's price.'"¹⁸¹⁷ The ER Respondents note that there was more demand from buyers than loans to supply, with Concordia only accepting new funds during limited periods of time.¹⁸¹⁸ The ER Respondents also contend that Concordia would pay off a contract in full whenever a lender wanted to get their money

¹⁸⁰³ Amended Notice at 16 ¶ 88(b).

¹⁸⁰⁴ Division Opening Br. at 62-63.

¹⁸⁰⁵ Tr. at 205 ("it was very liquid, I could quit at any time and ... the principal would be returned"); Exhs. S-11a, S-11b.

¹⁸⁰⁶ Tr. at 419-420 ("I was told no one ever had [lost 5 percent in a buyback] ... And I said 'What if I need some money' ... [Mr. Bersch] said 'If you need \$10,000, give me a call. We'll get it for you'"); Exhs. S-2a, S-2b.

¹⁸⁰⁷ Tr. at 498 ("If I asked for [my principal] back, it would take approximately a week, maybe two, for them to get all the monies and paperwork all straightened out"); Exhs. S-17a, S-17b.

¹⁸⁰⁸ Tr. at 707, 763 ("at any time we could get a return of our full investment"); Exhs. S-18a, S-18b.

¹⁸⁰⁹ Tr. at 1340 ("the investment was liquid"); Exhs. S-110a, S-110b, S-193 at ACC015233.

¹⁸¹⁰ Tr. at 1340-1341 ("Again, the aspect of liquidity was very important"); Exhs. S-111a, S-111b.

¹⁸¹¹ Tr. at 448-449 ("I could get my money back at any time that I wanted. It might take 90 days or so to get it back, but, you know, I could get it back, you know, if there was an emergency or something of that nature ... it was, you know, basically liquid"); Exhs. S-108a, S-108b.

¹⁸¹² Tr. at 1350-1351 ("liquidity"); Exhs. S-88a, S-88b.

¹⁸¹³ Tr. at 1351-1352 ("liquidity"); Exhs. S-54a, S-54b.

¹⁸¹⁴ Tr. at 1352 ("liquidity"); Exhs. S-57a, S-57b.

¹⁸¹⁵ Tr. at 1353 ("liquidity"); Exhs. S-50a, S-50b.

¹⁸¹⁶ Tr. at 1354, 2300 ("liquidity;" "there was an understanding that if ... you needed to get [your investment] back, you would just request it, and it may take a couple weeks, or a little bit"); Exhs. S-109a, S-109b.

¹⁸¹⁷ ER Respondents Br. at 51, quoting <http://www.investopedia.com/terms/l>.

¹⁸¹⁸ Tr. at 177-178.

1 out and investors were always able to get their money out, in full, prior to the financial crisis.¹⁸¹⁹ The
 2 ER Respondents argue, therefore, that any representations about liquidity would have been true when
 3 they were made.

4 The ER Respondents contend that the Division changed its theory when the Division, in its
 5 opening statement, argued that the 90-day right of first refusal in Section 7.1 of the Servicing
 6 Agreements rendered the investments illiquid. The ER Respondents contend that the Division fails to
 7 explain how this provision makes the Servicing Agreements illiquid. The ER Respondents contend
 8 that in spite of this provision, investors were able to get their money until the financial crisis and even
 9 the last person to invest, Mr. Bourlier in November 2008, was able to get his money back in full.¹⁸²⁰

10 The ER Respondents contend that the Division has further expanded the scope of its charge to
 11 include an investor being able to get his money out. The ER Respondents argue that the Division has
 12 failed to show the falsity of the representations made. The ER Respondents contend that the Division
 13 cannot argue the representations were false based upon subsequent financial difficulties because 1) the
 14 Division waived this argument by not mentioning it in their opening brief, and 2) falsity is judged at
 15 the time the statement is made.¹⁸²¹

16 In its Reply Brief, the Division argues that the ER Respondents represented to investors in
 17 presentations that: “Servicing Agreements provide a safety of principal guarantee and 100% liquidity
 18 in the event of emergency need;” and “Higher guaranteed yield to offset inflation, safety of principal
 19 backed by collateral and 100% liquidity has made Concordia Servicing Agreements the preferred fixed
 20 income investment for many of our clients.”¹⁸²² The Division argues that the representations of “100%
 21 liquidity” and the ability of investors to get their money out were false when Mr. Bersch and Mr.
 22 Wanzek made them. In support of this argument, the Division cites Chris Crowder’s testimony at his
 23 first examination under oath:

24 Q: Through 2007, could an investor come to Concordia and
 25

26 ¹⁸¹⁹ Tr. at 776, 871.

¹⁸²⁰ Tr. at 2035.

27 ¹⁸²¹ Citing, e.g., *In re Magnum Hunter Res. Corp. Sec. Litig.*, 26 F. Supp. 3d 278, 290 (S.D.N.Y. 2014) (in a securities fraud
 case, allegedly material misstatement must have been false at the time that it was made); *Pehlivanian v. China Gerui*
 28 *Advanced Materials Grp., Ltd.*, 153 F. Supp. 3d 628, 644 (S.D.N.Y. 2015).

¹⁸²² Exhs. S-13h at ACC004312, S-193 at ACC015233.

1 withdraw 100 percent of their investment principal?

2 A: Efforts would be made, you know, to do that. But it wasn't --- if
3 she'd asked me March 1st, I couldn't necessarily --- I may not be
4 able to, you know, do that on March 1st. It may take me some
5 time. What she could do is go to her [C]ustodian, take the
6 contracts and the titles, and she could perfect those in her name
7 and then start collecting on those.

8 * * *

9 [Chris Crowder's counsel]: I think what's not being said here, and
10 please let [the Division's counsel] know if it otherwise is, this is
11 clearly not a liquid investment.

12 A: No.

13 Q: And you didn't intend it to be a liquid investment.

14 A: No.

15 Q: Because you needed the principal to do your business: Purchase
16 truck contracts?

17 A: Right.

18 Q: Service these agreements?

19 A: Right.

20 Q: Pay for overhead?

21 A: Right.¹⁸²³

22 The Division further cites Chris Crowder's testimony, from his second examination under oath,
23 as evidence that Mr. Bersch and Mr. Wanzek knew the Concordia investments were not liquid:

24 Q: Mr. Crowder, in your testimony in California in 2013, do you
25 recall being asked about the liquidity of the investments in the
26 Servicing Agreements by [previous counsel for the Division]?
27

28 ¹⁸²³ Exh. S-165 at 70-71

1 Do you recall, in particular, testifying that they were not liquid;
2 they were never intended to be liquid?

3 A: Yes.

4 Q: Did Mr. Bersch -- do you know whether Mr. Bersch knew that
5 the investments in Concordia were not liquid?

6 A: He understood the process that I told you, that the investors could
7 take and perfect their titles and collect them on their own, and
8 that was it.

9 Q: The same question with respect to Mr. Wanzek. Did Mr. Wanzek
10 understand that the investments were not liquid, in the sense that
11 an investor couldn't call up and say, "Hey, I've got an emergency.
12 I need my \$100,000 back?"

13 A: Yes, and it's the same answer that I gave for Mr. Bersch. They
14 understood that it was -- they could perfect those, those titles, and
15 take. That's the only thing they definitely could do.

16 Q: And it would be up to the investor to perfect the title and to --

17 A: Start collecting.

18 Q: And start collecting from the trucker, or if the trucker went into
19 default, to repo the truck and then sell it on the secondary market,
20 right?

21 A: Correct.

22 Q: And you wouldn't characterize that process for the investor to
23 recoup their money as liquid, would you?

24 A: No.¹⁸²⁴

25 The Division states that Section 7.1 of the Servicing Agreements further demonstrates the
26 illiquid nature of the investments. The Division contends that Section 7.1 restricted an investor seeking
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28 ¹⁸²⁴ Exh. S-180 at 70-71.

1 cash through the sale or assignment of truck loans to a third party by requiring the investor to first offer
 2 the loans to Concordia, who could buy the loans at 95% of their existing principal balance with 90 days
 3 to accept or reject the offer.¹⁸²⁵

4 b) Analysis and Conclusion

5 The record establishes that Mr. Bersch and Mr. Wanzek told some Concordia investors that an
 6 investment would be liquid or that the investor could get his or her money out. This is information that
 7 would be material to a reasonable investor. We agree with the ER Respondents that a definition of
 8 “liquidity” is necessary to evaluate the Division’s claim that these statements were misrepresentations
 9 under A.R.S. § 44-1991(A)(2). However, we elect to rely upon a more standard authority, Black’s Law
 10 Dictionary, which defines liquidity as “[t]he quality, state, or condition of being readily convertible to
 11 cash.”¹⁸²⁶ Under this definition, prompt repayment of an investor’s principal would be one indication
 12 of liquidity and, therefore, we consider the Division’s arguments that misrepresentations about the ease
 13 of getting one’s money back go to “liquidity.” As such, we find no discrepancy between this allegation
 14 as presented in the Amended Notice and as presented in the Division’s post-hearing briefs.

15 We reject the Division’s argument that Section 7.1 of the Servicing Agreements defeats a
 16 representation of liquidity. The ER Respondents argue, and the record establishes, that prior to the
 17 financial crisis in 2008, investors could request a return of their principal, and that principal was
 18 returned.¹⁸²⁷ As the business practice of Concordia differed from the terms of Section 7.1 of the
 19 Servicing Agreements, that section cannot be the basis for a misrepresentation.

20 Concordia’s practice of returning principal to investors does not, in itself, defend against
 21 allegations of misrepresentations over liquidity of the investment. “Liquidity” requires more than just
 22 conversion to cash; the definition requires that the investment be “readily convertible to cash.” While
 23 Concordia made repayments to investors, these repayments were not so prompt as to consider the

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 25 ¹⁸²⁵ See, e.g. Exh. S-12a at § 7.1.

26 ¹⁸²⁶ *Liquidity*, Black’s Law Dictionary (10th Ed. 2014). We note that Black’s also lists a second definition of liquidity:
 27 “Securities. The characteristic of having enough units in the market that large transactions can occur without substantial
 28 price variations.” However, as Mr. Bersch and Mr. Wanzek both testified that they did not believe the Concordia investment
 to be a security, we find it unlikely they would have used the securities definition to describe it to investors. Tr. at 1602,
 1629, 1751, 1763. Indeed, Mr. Bersch testified at the hearing that he considered a liquid investment as being “[w]here an
 investor would request some money and it would be readily available to them, a return of money.” Tr. at 1932.

¹⁸²⁷ Tr. at 253, 260, 776, 870-871.

1 investments readily convertible to cash. Earlier investors were able to recoup money more easily. Mr.
 2 Luhr testified that following the 2005 death of his mother, an investor, he was able to liquidate her
 3 Concordia account and received “the return of her funds very efficiently and judiciously without any
 4 problems whatsoever.”¹⁸²⁸ The final investor in Concordia, Mr. Bourlier in November 2008, requested
 5 and received his full investment back, but he received it in installments and did not receive full
 6 repayment until six or seven months after requesting the return of his money.¹⁸²⁹ Accordingly, we find
 7 that the Concordia investments were not liquid, by definition, although investors could receive the
 8 return of their principal in time. In determining whether misrepresentations were made to investors
 9 regarding liquidity, we must carefully consider what the investors were told.

10 Before his investment on March 30, 2000, Mr. Dennison was told by Mr. Bersch that a request
 11 for return of principal could be honored within a week or two, allowing time “for them to get all the
 12 monies and paperwork all straightened out.”¹⁸³⁰ Prior to her investment on April 30, 2002, Ms. LeMay
 13 was told by Mr. Bersch that, in spite of the provision in the Servicing Agreement, no one had ever lost
 14 five percent in requesting their money back, and if she needed some funds back in an emergency, she
 15 could get them in a couple weeks.¹⁸³¹ Before investing on December 1, 2005, Mr. Hatch learned from
 16 Mr. Wanzek that his investment was “basically liquid” as he could get his investment money back,
 17 though it might take about 90 days to get it.¹⁸³² The representations made to Mr. Dennison, Ms. LeMay,
 18 and Mr. Hatch all indicated that while they could receive their investment funds back, Concordia would
 19 need some time to process the request. Based on the evidence of record, these representations were
 20 correct when they were made. Accordingly, we find no violations of A.R.S. § 44-1991(A)(2) regarding
 21 misrepresentations of “liquidity” made to these investors.

22 Mr. Luhr, who invested on May 11, 2004, testified that he was told by Mr. Bersch that an
 23 investment in Concordia was “very liquid” and that he understood his principal would be returned upon
 24 request without a problem.¹⁸³³ Prior to her first investment on April 1, 2008, Ms. Patricola was told by
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26 ¹⁸²⁸ Tr. at 253, 260.

27 ¹⁸²⁹ Tr. at 2035-2036, 2049.

28 ¹⁸³⁰ Tr. at 498; Exhs. S-17a, S-17b.

¹⁸³¹ Tr. at 271-272, 419-420; Exhs. S-2a, S-2b.

¹⁸³² Tr. at 448.

¹⁸³³ Tr. at 205, 263; Exhs. S-11a, S-11b.

1 Mr. Bersch that she could get her full investment back "at any given time."¹⁸³⁴ The record does not
2 establish that these investors were informed of any type of a waiting period that would delay the return
3 of their investment, which would constitute the omission of a material fact necessary to keep the
4 statements made to these investors from being misleading. Accordingly, we find that
5 misrepresentations regarding "liquidity" of the Concordia investment were made to Mr. Luhr and Ms.
6 Patricola by Mr. Bersch, in violation of A.R.S. § 44-1991(A)(2).

7 The only evidence as to several other investors came from hearsay testimony of the Division's
8 investigator, Mr. Clapper. When asked what attracted investors Hospice of Havasu, Mr. McCowan,
9 Mr. and Mrs. Martin, Mr. Roth, and Mr. Bronsart to invest in Concordia, Mr. Clapper testified that at
10 least one factor was "liquidity."¹⁸³⁵ Relying solely on this testimony, we cannot determine whether a
11 misrepresentation of "liquidity" was made to these investors. We cannot determine whether the word
12 "liquidity" was stated by one of the respondents to the investor, whether the investor used the word
13 "liquidity" based upon what was represented, or whether a Division investigator adopted "liquidity" as
14 shorthand for what the investor stated. The problem is exemplified with one investor, Mr. Peters, about
15 whom Mr. Clapper also testified that he was attracted to Concordia by "liquidity."¹⁸³⁶ When Mr. Peters
16 later testified at the hearing, he was specifically asked:

17 Q: Did Mr. Wanzek say anything about the liquidity of the
18 investment, like when you could get your money back if you
19 needed it?

20 A: Initially, it was understand – you know, there was an
21 understanding that if you needed a portion of it or ... you needed
22 to get it back, you would just request it, and it may take a couple
23 weeks, or a little bit, was my understanding.¹⁸³⁷

24 Mr. Peters was clearly informed that there would be some delay between a request for the return
25 of his investment and its actual return. Therefore, Mr. Peters, like Mr. Dennison, Ms. LeMay, and Mr.

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27 ¹⁸³⁴ Tr. at 707, 763; Exhs. S-18a, S-18b.

¹⁸³⁵ Tr. at 1340-1341, 1350-1353.

¹⁸³⁶ Tr. at 1354.

28 ¹⁸³⁷ Tr. at 2300.

Hatch, *supra*, cannot be said to have been given a misrepresentation regarding “liquidity” of the investment. Mr. Clapper gave similar testimony regarding “liquidity” for Mr. Peters as he did for other investors who did not testify: Hospice of Havasu, Mr. McCowan, Mr. and Mrs. Martin, Mr. Roth, and Mr. Bronsart. The record does not establish specifically what representations were made to these investors regarding “liquidity.” As such, the Division has failed to meet its burden of proof regarding the alleged misrepresentations of “liquidity” made to Hospice of Havasu, Mr. McCowan, Mr. and Mrs. Martin, Mr. Roth, and Mr. Bronsart.

Mr. Clapper testified similarly that one other investor, Ms. Fuhrman, was attracted by “liquidity” of the Concordia investment.¹⁸³⁸ In addition to the testimony of Mr. Clapper, the Division submitted a PowerPoint presentation, given to Ms. Fuhrman by Mr. Bersch, that described the Concordia investment as having “100% liquidity.”¹⁸³⁹ However, the record is unclear as to whether Ms. Fuhrman received this PowerPoint presentation before or after making her investment. As Ms. Fuhrman referred the investment to others, in return for finder’s fees from Mr. Bersch, she may not have received the PowerPoint until after making her investment.¹⁸⁴⁰ Based on the evidence presented, we find the Division has failed to meet its burden of proof regarding the alleged misrepresentation of “liquidity” made to Ms. Fuhrman.

Having considered the Division’s allegations of misrepresentations regarding the “liquidity” of the Concordia investment, we conclude that Mr. Bersch and ER Financial made misrepresentations to two investors, Mr. Luhr and Ms. Patricola, in violation of A.R.S. § 44-1991(A)(2). As to the remaining allegations of misrepresentations regarding liquidity, made to four investors by Mr. Bersch and ER Financial, and made to six investors by Mr. Wanzek and ER Financial, we find that the Division has failed to meet its burden of proof, and these allegations are dismissed.

3. Approved by a Third Party Insurer

In the Amended Notice, the Division alleged that ER Financial, Mr. Bersch and Mr. Wanzek violated A.R.S. § 44-1991(A) by representing to offerees and investors that the Concordia investment was “‘approved’ by a third-party insurer, leading investors to believe the insurer insured, underwrote

¹⁸³⁸ Tr. at 1340.

¹⁸³⁹ Tr. at 1336-1337; Exh. S-193 at ACC015233.

¹⁸⁴⁰ Tr. at 1396-1397, 1473, 1533.

or in some other way guaranteed the investment, when that was never the case.”¹⁸⁴¹ The Division presents no argument supporting this allegation in its Opening Post-Hearing Brief. The ER Respondents contend that this charge was waived as the Division failed to include it in the Division’s brief. The Division, in its Reply Brief, states that it has withdrawn this theory of a violation of A.R.S. § 44-1991(A).¹⁸⁴² Accordingly, we dismiss the allegations of fraud against ER Financial, Mr. Bersch, and Mr. Wanzek arising from the representation that Concordia’s investments were approved by a third-party insurer.

4. Failure to Disclose Finder’s Fees / Commissions

a) Argument

In the Amended Notice, the Division alleged that ER Financial, Mr. Bersch and Mr. Wanzek violated A.R.S. § 44-1991(A) by failing to disclose to offerees that Concordia would pay a finder’s fee to ER Financial if the offeree invested.¹⁸⁴³

The Division alleges that Mr. Bersch and ER Financial failed to disclose that they would receive a commission from Concordia to at least five investors: Mr. Luhr,¹⁸⁴⁴ Ms. LeMay,¹⁸⁴⁵ Mr. Dennison,¹⁸⁴⁶ Ms. Patricola,¹⁸⁴⁷ and Ms. Hodel.¹⁸⁴⁸ The Division further alleges that Mr. Wanzek and ER Financial failed to disclose that they would receive a commission to one investor, Mr. Hatch.¹⁸⁴⁹ The Division argues that “[t]he failure to disclose the payment of commissions ‘constitutes a violation of the antifraud provisions, since such a payment, especially to persons who have a fiduciary relationship with the purchaser, is a material fact that the purchaser will want to consider.’”¹⁸⁵⁰

The ER Respondents argue that the Division has not established a violation of A.R.S. § 44-

¹⁸⁴¹ Amended Notice at 16 ¶ 88(c).

¹⁸⁴² Division Reply Br. at 38.

¹⁸⁴³ Amended Notice at 16 ¶ 88(d).

¹⁸⁴⁴ Tr. at 207, 247.

¹⁸⁴⁵ Tr. at 272-273.

¹⁸⁴⁶ Tr. at 499-500.

¹⁸⁴⁷ Tr. at 708-709.

¹⁸⁴⁸ Tr. at 951.

¹⁸⁴⁹ Tr. at 451.

¹⁸⁵⁰ Division Opening Br. at 65, quoting Joseph C. Long *et al.*, 12 Blue Sky Law § 7:105 (2016 Update) *DuPont v. Brady*, 646 F. Supp. 1067, 1072 (S.D.N.Y. 1986) (failure to disclose commission paid by issuer to attorney upon investment by his client in a security was a material omission), *rev’d on other grounds*, 828 F.2d 75 (2d Cir. 1987); *Bruce Anthony Hayes, Former Registered Representative*, 2000 WL 340250 at *3 (N.Y.S.E. 1/27/2000) (censuring salesman who failed to disclose finder’s fee for selling private placement).

1 1991(A)(2) as the Division fails to set forth what statements were made by Mr. Bersch and Mr. Wanzek
 2 that would have been rendered misleading by the failure to disclose commissions. The ER Respondents
 3 further contend that that the “finder’s fee” was not a true finder’s fee or commission but rather was
 4 paid for filling out paperwork.¹⁸⁵¹

5 The ER Respondents dismiss authorities cited by the Division as being a footnote from “an
 6 obscure treatise” and an administrative decision of the New York Stock Exchange involving a short
 7 consent order from violations of New York Stock Exchange rules.¹⁸⁵² The ER Respondents cite an
 8 unpublished District Court decision from Texas that notes the SEC could find no cases where a non-
 9 broker had a duty to disclose the receipt of a commission from the sale of stock.¹⁸⁵³ The ER
 10 Respondents also quote a Second Circuit case for the proposition “that there is simply no requirement
 11 for ‘the registered representatives who deal with the customers to disclose their own compensation,’ so
 12 a fraud finding cannot be made on that basis.”¹⁸⁵⁴

13 The ER Respondents contend that the fees were disclosed to anyone who asked,¹⁸⁵⁵ so anyone
 14 who was interested in the fees was informed. Further, the ER Respondents contend that the investors
 15 were sophisticated and would assume that a commission or finder’s fee was being paid.

16 The ER Respondents further argue that the fees were paid out of Concordia’s funds, not from
 17 the customers’ funds like a traditional brokerage, therefore the fees would not be material information
 18 for buyers, as required under A.R.S. § 44-1991(A)(2).

19 The Division contends that the ER Respondents had a duty¹⁸⁵⁶ to disclose that Concordia would
 20 pay them commissions, because they were CPAs for many of the investors: Mr. Bersch was the CPA
 21 for Mr. Luhr,¹⁸⁵⁷ Ms. LeMay,¹⁸⁵⁸ Mr. Dennison,¹⁸⁵⁹ and Mr. and Mrs. Hodel;¹⁸⁶⁰ and Mr. Wanzek was

23 ¹⁸⁵¹ Tr. at 1728-1732, 1735.

24 ¹⁸⁵² ER Respondents Br. at 54-55.

¹⁸⁵³ *S.E.C. v. Mapp*, 4:16-CV-246, 2016 WL 5870576, at *7 (E.D. Tex. Oct. 7, 2016).

25 ¹⁸⁵⁴ ER Respondents Br. at 55, quoting *United States v. Skelly*, 442 F.3d 94, 97 (2d Cir. 2006).

¹⁸⁵⁵ Tr. at 1620, 1759.

26 ¹⁸⁵⁶ “As a matter of public policy, attorneys, accountants, and other professionals owe special duties to their clients . . .”
Barmat v. John & Jane Doe Partners A-D, 155 Ariz. 519, 523, 747 P.2d 1218, 1222 (1987).

27 ¹⁸⁵⁷ Tr. at 202.

¹⁸⁵⁸ Tr. at 266.

28 ¹⁸⁵⁹ Tr. at 497.

¹⁸⁶⁰ Tr. at 944.

1 the CPA for Mr. Hatch.¹⁸⁶¹ The Division notes that Arizona law places an affirmative duty on a CPA
 2 “who will receive a commission to make a written disclosure ‘to any person or entity to which the
 3 certified public accountant, public accountant, or firm recommends or refers a product or service to
 4 which the commission relates.’”¹⁸⁶² The Division further quotes an SEC ruling that held “[w]hen
 5 recommending a security to a customer, a [salesman] has a duty to disclose material adverse facts of
 6 which he is aware such as economic self-interest because such facts could influence the [salesman’s]
 7 recommendation.”¹⁸⁶³ The Division argues that an investor “must be permitted to evaluate overlapping
 8 motivations through appropriate disclosures, especially where one motivation is economic self-
 9 interest.”¹⁸⁶⁴ The Division contends that it was incumbent upon Mr. Bersch and Mr. Wanzek to disclose
 10 their receipt of commissions so investors could evaluate their recommendation of Concordia
 11 investments based on the benefits to Mr. Bersch and Mr. Wanzek versus the purported benefits for the
 12 investors. The Division argues that the omission of the receipt of commissions would have been
 13 material to a reasonable investor, especially since Concordia paid substantial commissions to ER
 14 Financial, \$565,424 between 2004 through 2008 alone.¹⁸⁶⁵

15 The Division disputes the ER Respondents’ argument that the finder’s fees were paid for
 16 completing paperwork, quoting the testimony of Ken Crowder at his examination under oath:

17 Q: . . . What were those finder’s fees paid for?

18 A: The first time a new investor was brought in, or if that investor,
 19 portfolio investor, added additional significant, significant
 20 amounts of money, the finder’s fee was paid for the person, to

21 ¹⁸⁶¹ Tr. at 452.

22 ¹⁸⁶² Division Reply Br. at 44, quoting A.A.C. R4-1-455(B)(2)(e). Effective January 1, 2018, A.A.C. R14-1-455(B)(2)(e)
 23 was amended to incorporate the American Institute of CPAs Code of Conduct (“AICPA Code”). 23 Ariz. Admin. Reg.
 24 3253-3254, 2017 AZ REG TEXT 447702 (November 24, 2017). Section 1.520.001.03 of the AICPA Code provides that
 25 “[a] member in public practice who is not prohibited by this rule from performing services for or receiving a commission
 and who is paid or expects to be paid a commission shall disclose that fact to any person or entity to whom the member
 recommends or refers a product or service to which the commission relates.” Pursuant to AICPA Code Section 1.520.080,
 these disclosures should be made in writing.

26 ¹⁸⁶³ *In re McGee*, Exchange Act Release No. 34-80314, 2017 WL 1132115 at *7 (Mar. 27, 2017) (internal quotations
 27 omitted). “McGee violated Exchange Act Section 10(b) and Exchange Act Rule 10b-5 because his compensation from [the
 issuer] was a material fact that he had a duty to disclose.” *Id.* at *6. See also *In re Scholander*, Exchange Act Release No.
 34-77492, 2016 WL 1255596 (Mar. 31, 2016) (salesman’s failure to disclose \$350,000 payment from the issuer sufficient
 to support a finding a fraud).

28 ¹⁸⁶⁴ *Chasins v. Smith, Barney & Co.*, 438 F.2d 1167, 1172 (2d Cir. 1970).

¹⁸⁶⁵ Exh. S-194.

1 the person who brought them to the company.¹⁸⁶⁶

2 The Division contends that Concordia paid the ER Respondents to recruit new investors to raise money
3 for Concordia.

4 The Division differentiates the federal case law cited by the ER Respondents for the proposition
5 that commissions need not be disclosed as neither of those cases involved a situation like this, where
6 state law imposed an affirmative duty on Mr. Bersch and Mr. Wanzek. Further, the Division argues
7 that the Commission should reject the non-controlling caselaw presented by the ER Respondents,
8 quoting the Arizona Court of Appeals in *Siporin*:

9 [W]e will not defer to federal case law when, by doing so, we would be
10 taking a position inconsistent with the policies embraced by our own
11 legislature. We will depart from those federal decisions that do not
12 advance the Arizona policy of protecting the public from unscrupulous
13 investment promoters.¹⁸⁶⁷

14 b) Analysis and Conclusion

15 The ER Respondents correctly contend that the Division has failed to set forth specific
16 statements made by Mr. Bersch or Mr. Wanzek that were rendered misleading. In applying A.R.S. §
17 44-1991(A)(2), we consider the allegedly omitted material fact, here the receipt of finder's fees or
18 commissions, against the totality of the pre-investment "statements made, in the light of the
19 circumstances under which they were made" to the individual investor. Mr. Bersch and Mr. Wanzek
20 made statements to potential investors within the context of recommending the Concordia investment
21 to them. We find that a recommendation regarding an investment becomes misleading when the
22 recommendation is based upon a benefit to be received by the offeror as opposed to the benefit that
23 would be received by the investor. A prospective investor must make that determination for his or her
24 self, and a material fact toward making that determination would be the economic benefit to be received
25 by the offeror.

26 We adopt this approach bearing in mind the Legislature's instruction that the Act "be liberally

27 ¹⁸⁶⁶ Exh. S-163 at 42-42.

28 ¹⁸⁶⁷ *Siporin*, 200 Ariz. at 103 ¶ 28, 23 P.3d at 98.

1 construed to effect its remedial purpose of protecting the public interest.”¹⁸⁶⁸ As directed by the
2 Arizona Court of Appeals in *Siporin*, we find proper enforcement of the Act requires that we reject the
3 approach of the Second Circuit which finds no need for a securities salesperson to disclose
4 compensation. We find the better approach to be that:

5 When a salesperson recommends a security to a customer, the
6 salesperson must disclose material facts with respect to the investment.

7 The salesperson must not only avoid affirmative misstatements, but also
8 must disclose material adverse facts, including any self-interest that
9 could influence such investment advice.¹⁸⁶⁹

10 The ER Respondents’ attempt to characterize the fees received as being for “paperwork,” rather
11 than traditional finder’s fees, does not obviate the necessity to have disclosed the fees. Regardless of
12 how the ER Respondents characterize the nature of the fees, they received payments from Concordia
13 as a result of bringing in new investors and, therefore, they had a financial stake in these investments
14 that they did not disclose to potential investors for whom they recommended the Concordia investment.
15 The ER Respondents’ argument that they were paid by Concordia and not by the investors does not
16 lessen the self-interest of the ER Respondents’ in recommending the Concordia investments.

17 We further reject the arguments raised by the ER Respondents that they disclosed the fees to
18 anyone who asked, and that the investors were sophisticated and should have known the ER
19 Respondents would be paid. We find the ER Respondents had a duty to disclose their fees. The ER
20 Respondents cannot thrust this duty upon the investors to determine through inquiry or conjecture.

21 We conclude that the omission of the information that Mr. Bersch, Mr. Wanzek, and ER
22 Financial would receive a finder’s fee or commission constituted the omission of a material fact, in
23 violation of A.R.S. § 44-1991(A)(2). Mr. Bersch and ER Financial committed five violations of A.R.S.
24 § 44-1991(A)(2) by failing to disclose their receipt of fees to five investors: Mr. Luhr, Ms. LeMay, Mr.
25 Dennison, Ms. Patricola, and Ms. Hodel. Mr. Wanzek and ER Financial committed one violation of
26 A.R.S. § 44-1991(A)(2) by failing to disclose their receipt of fees to one investor, Mr. Hatch.

27 ¹⁸⁶⁸ *E. Vanguard Forex*, 206 Ariz. at 410 ¶ 36, 79 P.3d at 97. See also *Hirsch* 237 Ariz. at 466 ¶ 40, 352 P.3d at 935.

28 ¹⁸⁶⁹ *In re Dubois*, Exchange Act Release No. 33-8264, 2003 WL 21946858 at *3 (Aug. 13, 2003) (internal quotations omitted).

1 5. Unlicensed Escrow Business

2 a) Argument

3 The Division contends that ER Financial, or Mr. Bersch and Mr. Wanzek doing business as
4 “ER Financial and Advisory Service,” as Custodian for all 132 investment contracts at issue, engaged
5 in and carried on an escrow business and acted in the capacity of escrow agents, within the meaning of
6 A.R.S. §§ 6-801 and 6-813. A.R.S. § 6-801(4) provides:

7 “Escrow” means any transaction in which any escrow property is
8 delivered with or without transfer of legal or equitable title, or both, and
9 irrespective of whether a debtor-creditor relationship is created, to a
10 person not otherwise having any right, title or interest therein in
11 connection with the sale, transfer, encumbrance or lease of real or
12 personal property, to be delivered or redelivered by that person upon the
13 contingent happening or nonhappening of a specified event or
14 performance or nonperformance of a prescribed act, when it is then to be
15 delivered by such person to a grantee, grantor, promisee, promisor,
16 obligee, obligor, bailee or bailor, or any designated agent or employee of
17 any of them. Escrow includes subdivision trusts and account servicing.

18 An “[e]scrow agent” means any person engaged in the business of accepting escrows.”¹⁸⁷⁰ An
19 “[e]scrow business” means a commercial activity characterized by the regular and continuous carrying
20 on of escrow transactions.”¹⁸⁷¹ Escrow property is defined as “money, a written instrument or evidence
21 of title or possession to real or personal property or any other thing of value.”¹⁸⁷²

22 Under A.R.S. § 6-813(A), “a person . . . shall not engage in or carry on, or hold himself out as
23 engaging in or carrying on, the escrow business or act in the capacity of an escrow agent in this state
24 without first obtaining a license.” The Division cites *McCormack v. Kirtley*, wherein the Arizona
25 Supreme court held that “the fact that the parties to an agreement do not label the deposit of the funds
26

27 ¹⁸⁷⁰ A.R.S. § 6-801(5).

28 ¹⁸⁷¹ A.R.S. § 6-801(6).

¹⁸⁷² A.R.S. § 6-801(7).

1 a deposit in escrow does not preclude us from concluding that that was their intention.”¹⁸⁷³ *McCormack*
 2 found an agreement between a purchaser and seller of a bar also was an escrow agreement because a
 3 real estate broker, who was a party to the agreement, received funds from the purchaser into her trust
 4 account, which she was obligated to distribute.¹⁸⁷⁴ The Division also cites *Feighner v. Clarke*, which
 5 held that an attorney acted as an escrow agent by receiving funds, from a prospective purchaser of a
 6 trucking business, that were to become the sole property of the seller upon fulfillment of conditions in
 7 the agreement.¹⁸⁷⁵

8 The Division contends that pursuant to each Servicing Agreement and Custodial Agreement,
 9 Concordia would deliver Conditional Sales Contracts and vehicle titles to ER Financial. The Division
 10 argues that the Conditional Sales Contracts and vehicle titles were escrow property under A.R.S. § 6-
 11 801(7), and that ER Financial did not have any right, title, or interest therein, in connection with the
 12 sale, transfer encumbrance or lease of the Conditional Sales Contracts and vehicle titles. The Division
 13 notes that the terms of the Servicing Agreement obligated ER Financial to hold the Conditional Sales
 14 Contracts for the benefit of Concordia and the investor.¹⁸⁷⁶ The Servicing Agreement provided terms
 15 obligating ER Financial to return the Conditional Sales Contracts and titles to Concordia upon the
 16 occurrence of specified events, or to release the documents to the investor upon a default by
 17 Concordia.¹⁸⁷⁷ The Division contends that ER Financial’s duties and activities as Custodian meet the
 18 definition of an escrow agent under A.R.S. § 6-801(4) and (5).

19 The Division argues that because ER Financial functioned as an escrow agent, it was required
 20 to be licensed by the Arizona Department of Financial Institutions (“ADFI”) under A.R.S. § 6-813.
 21 The Division notes that Mr. Bersch and Mr. Wanzek both testified that, prior to this case, they had
 22 never heard of the escrow licensing requirements,¹⁸⁷⁸ and that ER Financial was never licensed as an
 23 escrow business.¹⁸⁷⁹ The Division argues that as an unlicensed escrow business, ER Financial could
 24

25 ¹⁸⁷³ *McCormack v. Kirtley*, 115 Ariz. 25, 28, 563 P.2d 280, 283 (1977).

26 ¹⁸⁷⁴ *Id.*

27 ¹⁸⁷⁵ *Feighner v. Clarke*, 2 Ariz. App. 286, 288-289, 408 P.2d 219, 221-222 (1965), vacated on other grounds, 101 Ariz. 334, 419 P.2d 513 (1966).

28 ¹⁸⁷⁶ See, e.g., Exh. S-12a at § 4.1.

¹⁸⁷⁷ See, e.g., Exh. S-12a at § 4.

¹⁸⁷⁸ Tr. at 1621, 1759-1760.

¹⁸⁷⁹ Tr. at 1703, 1928.

1 have been shut down at any time by ADFI.¹⁸⁸⁰

2 The Division argues that it would have been material information for a reasonable investor to
3 know that ER Financial was operating as an unlicensed escrow business that was subject to being shut
4 down by ADFI. The Division compares the present matter with a federal district court decision, *S.E.C.*
5 *v. Levine*, 671 F. Supp. 2d 14 (D.D.C. 2009). In *Levine*, investment promoters, through their
6 companies, sold stock in other companies “by sending the investor a securities purchase agreement
7 and, after receiving the money from the investor, sending the investor the share certificate.”¹⁸⁸¹ In this
8 manner, the investment promoters in *Levine* acted as escrow agents, although neither they nor their
9 companies were licensed under state law as escrow agents.¹⁸⁸² “Investors were not informed that the
10 companies receiving their funds . . . were not licensed by the State of Nevada to engage in escrow
11 services.”¹⁸⁸³ The *Levine* court held that the investment promoters violated §17(a) of the Securities
12 Act of 1933 and § 10(b) of the Exchange Act of 1934 “by engaging in an illegal escrow business in
13 connection with the offer or sale of securities”¹⁸⁸⁴ The Division contends that the *Levine* court found
14 the omission of this information to investors to be material as the court ruled, “[s]urely a reasonable
15 investor would want to know that the ‘escrow agent’ he/she is sending their money to is not even
16 licensed to be engaged in that type of business activity.”¹⁸⁸⁵

17 The Division argues that *Levine* can be applied to this matter. The Division argues it is no
18 defense that the Respondents called ER Financial a “Custodian” rather than an escrow agent, which
19 ER Financial was, in fact. The Division quotes *Levine*: “But the fact that Euro Escrow held itself out .
20 . . as something other than an escrow agent does not negate the fact that it did, in fact, act as an escrow
21 agent.”¹⁸⁸⁶ The Division argues that the failure to disclose to investors that ER Financial was engaged
22 in the conduct of an unlicensed escrow business was a material omission. As such, the Division argues
23

24 ¹⁸⁸⁰ The Division quotes A.R.S. § 6-833(A) which provides, in pertinent part, that if an escrow “agent’s affairs are in an
25 unsafe condition, [ADFI] may immediately take possession of all the property, business and assets of the agent.” In its
Opening Post-Hearing Brief, the Division misattributes this provision as A.R.S. § 6-840(A). Division Opening Br. at 71.

26 ¹⁸⁸¹ *Levine*, 671 F. Supp. 2d at 23.

27 ¹⁸⁸² *Id.* at 25, 28. *Levine* applied Nevada state law, which defined escrow agent as “any person engaged in the business of
administering escrows for compensation.” *Id.* at 28, quoting Nev. Rev. Stat. § 645A.010(5).

28 ¹⁸⁸³ *Id.* at 29.

¹⁸⁸⁴ *Id.*

¹⁸⁸⁵ *Id.*

¹⁸⁸⁶ *Id.* at 25.

1 that Mr. Bersch, Mr. Wanzek and ER Financial violated A.R.S. § 44-1991(A)(2) as to all 132
2 investment contracts.

3 The ER Respondents argue that the Division has failed to prove that there was no escrow
4 license. The ER Respondents contend that, over the years, Mr. Bersch and Mr. Wanzek may have
5 forgotten whether they had received an escrow license. The ER Respondents further postulate that
6 their former accounting partner, Charles Buttke, could have obtained a license. The ER Respondents
7 further argue that “sometimes licenses can be issued by operation of law, so perhaps CPAs either don’t
8 need such a license or are automatically granted one.”¹⁸⁸⁷

9 The ER Respondents further argue that ER Financial’s actions as Custodian did not meet the
10 statutory definition of an escrow business. The ER Respondents focus on that portion of A.R.S. § 6-
11 801(4) that requires the transaction to be “in connection with the sale, transfer, encumbrance or lease
12 of real or personal property.” The ER Respondents contend that this section of the statute keeps the
13 definition of escrow from expanding to include such bailees as dry cleaners and valet parking, where
14 another’s property is held, or the Commission itself, which holds property in the form of restitution
15 payments until they are distributed. The ER Respondents contend that they were simple bailees,
16 holding truck titles on behalf of Concordia and the investors. The ER Respondents contrast this
17 situation with the truck dealers and truck buyers, where an escrow could be found to exist based on the
18 sale of the truck. The ER Respondents question why, if ER Financial was conducting an escrow
19 business, ADFI has taken no action against them or the other Custodians, Chino Commercial Bank and
20 Sunset Financial.

21 Further, the ER Respondents contend that the issue is not material. The ER Respondents argue
22 that the record does not show how the presence of an escrow license would have benefitted investors.
23 The ER Respondents argue that the underlying problem was not ER’s performance in holding the titles,
24 but rather Concordia’s inability to pay the truck loan contracts in full due to the economic collapse at
25 the time. Further, the ER Respondents contend that investors testified that the lack of an escrow license
26 had no impact on their investment decision.¹⁸⁸⁸ The ER Respondents also argue that no investor

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28 ¹⁸⁸⁷ ER Respondents Br. at 56.

¹⁸⁸⁸ Mr. Foti (Tr. at 2123-2124) and Mr. Carr (Tr. at 2188).

1 informed the Division that they were concerned about the lack of an escrow license.¹⁸⁸⁹ The ER
 2 Respondents argue that not only had Mr. Bersch and Mr. Wanzek never heard of an escrow license,
 3 but neither had the Division's investigator, Gary Clapper.¹⁸⁹⁰ The ER Respondents contend that the
 4 breach of "some obscure law" and the nondisclosure of this breach "should not be sufficient to support
 5 a claim of securities fraud."¹⁸⁹¹

6 The ER Respondents further argue that the legislature has vested regulation of escrow agents
 7 with ADFI, and the Commission "may not invade ADFI's jurisdiction."¹⁸⁹² The ER Respondents state
 8 that the Commission's powers are limited and do not exceed those derived from a strict construction
 9 of the Arizona Constitution and implementing statutes.¹⁸⁹³ As such, the ER Respondents contend that
 10 the Commission does not have jurisdiction over escrow issues. Moreover, the ER Respondents contend
 11 that "comity and respect for a fellow Arizona State agency weigh against intruding into ADFI's
 12 realm."¹⁸⁹⁴

13 In its Reply Brief, the Division reiterates its prior analysis as to why the ER Respondents'
 14 unlicensed escrow activities violated A.R.S. § 44-1991(A) in connection with the offer or sale of
 15 Concordia's securities. In support of its argument of the materiality of unlicensed activity, the Division
 16 supplements *Levine* by citing another federal district court case, *S.E.C. v. Randy*, that found material
 17 the nondisclosure of a bank's lack of legal licensing while the bank sold its securities.¹⁸⁹⁵

18 The Division calls "spurious" the ER Respondents' contention that it failed to prove they were
 19 unlicensed escrow agents when Mr. Bersch and Mr. Wanzek both testified that they never applied to
 20 be licensed as escrow agents and ER Financial was never licensed as an escrow business. The Division
 21 further distinguishes the ER Respondents' analogies to dry cleaners and valets, which do not involve
 22 the statutorily required "sale, transfer [or] encumbrance" of property, and contain no "contingent
 23 happening or non-happening of a specific event or performance or nonperformance of a prescribed act"

25 ¹⁸⁸⁹ Tr. at 1390.

26 ¹⁸⁹⁰ Tr. at 1390, 1621-1622, 1759-1760.

27 ¹⁸⁹¹ ER Respondents Br. at 58.

28 ¹⁸⁹² *Id.* at 59, citing A.R.S. §§ 6-813, 6-831, et. seq.

¹⁸⁹³ *Id.*, quoting *Tonto Creek Estates Homeowners Ass'n v. Arizona Corp. Comm'n*, 177 Ariz. 49, 55, 864 P.2d 1081, 1087 (App. 1993) and *Commercial Life Ins. Co. v. Wright*, 64 Ariz. 129, 139, 166 P.2d 943, 949 (1946).

¹⁸⁹⁴ *Id.*

¹⁸⁹⁵ *S.E.C. v. Randy*, 38 F. Supp. 2d 657, 669 (N.D. Ill. 1999).

1 other than payment to trigger return of the clothes or car. The Division argues that the difference in
2 this matter is that the ER Respondents held personal property, the truck loan contracts and title liens,
3 “in connection with the sale, transfer [or] encumbrance . . . of . . . personal property,” the trucks. The
4 Division notes that unlike the dry cleaner or valet, whether ER Financial returned a truck loan contract
5 and title lien to Concordia was contingent upon the trucker paying off the loan or defaulting, in which
6 case Concordia was obligated to provide a substitute Conditional Sales Contract.¹⁸⁹⁶ For ER Financial
7 to deliver the truck loan contract and title lien to the investor was contingent upon whether Concordia
8 defaulted or consented for ER to do so.¹⁸⁹⁷

9 While the ER Respondents argue that no investor expressed concern over their unlicensed
10 escrow business, the Division contends this argument is erroneous because the test for materiality is an
11 objective standard: “Under this test, there is no need to investigate whether an omission or misstatement
12 was actually significant to a particular buyer.”¹⁸⁹⁸ The Division further contends that it is irrelevant
13 that the ER Respondents were not shut down and no investor was thereby harmed, because, like a drunk
14 driver who does not get in an accident, the public is still endangered and the law violated.

15 The Division further argues that the ER Respondents’ argument that the Commission lacks
16 jurisdiction over escrow issues should be rejected because the Division is seeking not to enforce escrow
17 laws but the anti-fraud provisions of the Act. The Division argues that the SEC was not found to be
18 attempting to enforce Nevada escrow licensing laws in *Levine*, or bank licensing laws in *Randy*. The
19 Division contends that the securities fraud in those cases, like this matter, arose from the failure to
20 inform investors of the unlicensed, and therefore unlawful, business activity they were conducting.

21 b) Analysis and Conclusion

22 The ER Respondents challenge the sufficiency of the evidence to establish the Division’s
23 allegations that they acted as unlicensed escrow agents or operated an unlicensed escrow business. The
24 uncontroverted testimony of Mr. Bersch and Mr. Wanzek was that they were unaware of escrow
25 licensing requirements and that ER Financial was never licensed as an escrow business.¹⁸⁹⁹ The ER

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27 ¹⁸⁹⁶ See, e.g., Exh. S-12a at §§ 1.10 and 4.1.

¹⁸⁹⁷ See, e.g., Exh. S-12a at §§ 4.2, 4.3, and 7.

¹⁸⁹⁸ *Hirsch*, 237 Ariz. at 463-464 ¶ 27, 352 P.3d at 932-933.

¹⁸⁹⁹ Tr. at 1621, 1703, 1759-1760, 1928.

1 Respondents speculate that perhaps ER Financial actually had an escrow license as the memories of
2 Mr. Bersch and Mr. Wanzek may have faded on this issue, or ER Financial may have obtained a license
3 through the actions of someone else, or ER Financial may have obtained a license by operation of some
4 unidentified law. Administrative hearings in Arizona require proof by a preponderance of the
5 evidence.¹⁹⁰⁰ We find the Division, through the uncontroverted testimony of Mr. Bersch and Mr.
6 Wanzek, has met this standard of proof to establish that the ER Respondents were not licensed as
7 escrow agents or as an escrow business.

8 We next consider whether the activities engaged in by the ER Respondents constituted the
9 actions of escrow agents or an escrow business. Each of the investment contracts for which the
10 Division asserts a violation against the ER Respondents consisted of both a Servicing Agreement,
11 signed on behalf of Concordia and the investor, and a Custodial Agreement, signed on behalf of
12 Concordia, the investor, and ER Financial as Custodian.¹⁹⁰¹ Under the terms of the Custodial
13 Agreement, ER Financial, as Custodian, was to hold the Conditional Sales Contracts and “all evidences
14 of title with respect to the vehicles covered by the Contracts, with separate assignments executed by
15 Concordia which effect the arrangement and transfer of the Contracts and title to the vehicles to
16 Investor.”¹⁹⁰² ER Financial was to hold the Conditional Sales Contracts and supporting documents
17 until: 1) the trucker defaulted or paid off the loan, at which time the documents would be returned to
18 Concordia; or 2) Concordia defaulted under the terms of the Servicing Agreement, at which time the
19 investor could request the documents if Concordia failed to cure its default.¹⁹⁰³

20 We find that the Conditional Sales Contracts and title documentation held by the ER
21 Respondents constituted escrow property, as defined by A.R.S. § 6-801(7). The ER Respondents held
22 this escrow property, which they otherwise had no right, title or interest in, in connection with the sale
23 of personal property (i.e., the trucks), until one of the contingencies specified in the Servicing
24 Agreement occurred, at which time the ER Respondents were to deliver the Conditional Sales Contracts
25 and title documentation to Concordia or the investor. This procedure differs from the ER Respondents’
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27 ¹⁹⁰⁰ *Culpepper v. State*, 187 Ariz. 431, 437, 930 P.2d 508, 514 (App. 1996).

¹⁹⁰¹ See, e.g., Exhs. S-12a, S-12b.

¹⁹⁰² See, e.g., Exh. S-12b at §§ 2, 3.

28 ¹⁹⁰³ See, e.g., Exhs. S-12a at §§ 3.7, 4, S-12b at 4.1.

1 comparisons, dry cleaning and valet parking, neither of which involve a sale, transfer, encumbrance or
 2 lease of property. Accordingly, we find that the procedure whereby the ER Respondents' held
 3 Conditional Sales Contracts and title documents under the terms of the investment contracts meets the
 4 definition of escrow, under A.R.S. § 6-801(4). The ER Respondents acted as escrow agents and
 5 conducted an escrow business, under A.R.S. § 6-801(5) and (6). By acting as escrow agents and
 6 conducting an escrow business, the ER Respondents were required to be licensed pursuant to A.R.S. §
 7 6-813.

8 A violation of the escrow licensing laws is a matter for ADFI. However, if the failure to disclose
 9 that violation allegedly results in fraud involving the offer or sale of a security, then such an allegation
 10 is properly before the Commission. Here, the ER Respondents made statements to investors that they
 11 would be holding Conditional Sales Contracts and vehicle title documents without disclosing that these
 12 were escrow activities and that the ER Respondents were not licensed as escrow agents or an escrow
 13 business. Whether this omission by the ER Respondents was material does not depend on its actual
 14 significance to any particular investor, as the test of materiality is an objective one.¹⁹⁰⁴ The *Levine*
 15 court found that a reasonable investor would want to know that the escrow agent receiving the
 16 investor's money was not licensed to engage in that activity. We agree that this would be material
 17 information to a reasonable investor, especially considering that the unlicensed escrow activity of the
 18 ER Respondents could have been subject to a cease and desist order from ADFI,¹⁹⁰⁵ or seizure of the
 19 escrow property if ADFI determined that ER Financial's "affairs [were] in an unsafe condition."¹⁹⁰⁶

20 We conclude that the omission of information to investors that Mr. Bersch, Mr. Wanzek, and
 21 ER Financial acted as unlicensed escrow agents and an unlicensed escrow business constituted the
 22 omission of a material fact, in violation of A.R.S. § 44-1991(A)(2). We assess the number of violations
 23 against the ER Respondents based upon the number of investment contracts attributed to each: 132

24 ¹⁹⁰⁴ *Hirsch*, 237 Ariz. at 463 ¶ 27, 352 P.3d at 933.

25 ¹⁹⁰⁵ A.R.S. § 6-137 provides, in pertinent part:

26 A. If it appears to the superintendent that any person has engaged, is engaging or is about to engage in any act, practice or
 27 transaction which constitutes a violation of this title . . . the superintendent may issue an order directing the person and
 28 directors, officers, employees and agents of the person to cease and desist from engaging in the act, practice or transaction
 or doing any act in furtherance of the act, practice or transaction and to take appropriate affirmative action, within a
 reasonable period of time as prescribed by the superintendent, to correct the conditions resulting from the act, practice or
 transaction.

¹⁹⁰⁶ A.R.S. § 6-833(A).

1 violations by ER Financial, 63 violations by Mr. Bersch, and 53 violations by Mr. Wanzek.

2 6. Low Risk and Safety of Principal

3 In the Division's Opening Post-Hearing Brief, the Division contends that Mr. Bersch
4 represented to Mr. Luhr, Ms. Patricola, and Ms. Fuhrman that there was little to no risk to the Concordia
5 investment and that their principal amounts would be safe. The Division further contends that Darrell
6 and Kathy Martin, who learned about the investment from Mr. Wanzek, were attracted to invest
7 because the Concordia investment provided safety of principal.

8 The ER Respondents argue that the Division has failed to identify how it believes that these
9 representations were false. The ER Respondents further contend that this claim was not included in
10 the Amended Notice, having been mentioned for the first time by the Division in its opening statement
11 at the hearing.¹⁹⁰⁷ The ER Respondents contend that there was no notice of this allegation prior to the
12 hearing and that it would violate due process to consider this charge.

13 The Division, in its Reply Brief, states that it agrees to withdraw this theory of fraud "in order
14 to reduce the issues on which these Respondents will inevitably appeal."¹⁹⁰⁸ Accordingly, we dismiss
15 the allegations of fraud against ER Financial, Mr. Bersch, and Mr. Wanzek arising from representations
16 that the Concordia investment was low risk and provided safety of principal.

17 7. Monitoring Concordia's Financial Position

18 a) Argument

19 In the Division's Opening Post-Hearing Brief, the Division alleges that Mr. Bersch and Mr.
20 Wanzek represented to at least two investors, Mr. Dennison and Ms. LeMay, that they monitored
21 Concordia's financial position for the investors.¹⁹⁰⁹ The Division contends that Mr. Bersch testified
22 that he did not recall receiving financial information about Concordia and, therefore, he could not have
23 been monitoring Concordia's financial position.¹⁹¹⁰ The Division further contends that Mr. Wanzek
24 testified that he did not always receive Concordia's financial statements and, therefore, it was
25 misleading for him to represent that he was monitoring Concordia's financial position.¹⁹¹¹

26 ¹⁹⁰⁷ Tr. at 15.

27 ¹⁹⁰⁸ Division Reply Br. at 38.

28 ¹⁹⁰⁹ Tr. at 510; Exhs. S-2f, S-17e. *See also* Exh. S-2h.

¹⁹¹⁰ Tr. at 1903-1904.

¹⁹¹¹ Tr. at 1637-1640.

1 The ER Respondents contend that this charge was not mentioned prior to the Division's
2 Opening Post-Hearing Brief. The ER Respondents state that they do not consent to the trial of this
3 charge and contend that consideration of this new charge would be unfair and violate due process as
4 they have not had an opportunity to present witnesses or evidence on this issue.

5 The ER Respondents contend that should the Commission consider this charge, the charge
6 arises from an undated, unsigned letter.¹⁹¹² The ER Respondents argue that the Division did not prove
7 that Mr. Bersch or Mr. Wanzek sent the letter. The ER Respondents further argue that the Division did
8 not establish when the letter was sent and, therefore, the Division cannot prove the statement was false
9 when it was made because Mr. Bersch and Mr. Wanzek were on Concordia's Board for a period of
10 time and Mr. Wanzek did receive some financial statements.

11 The Division, in its Reply Brief, restates its theory that Mr. Bersch and Mr. Wanzek
12 misrepresented that they monitored Concordia's financial position. The Division contends that it raised
13 this theory of fraud for the first time in its Opening Post-Hearing Brief because the hearing provided
14 the Division its first opportunity to determine whether Mr. Bersch and Mr. Wanzek monitored
15 Concordia's financial position as they claimed. The Division contends that it could not make this
16 determination sooner because Mr. Bersch asserted his privilege against self-incrimination throughout
17 his examination under oath and Mr. Wanzek refused to appear for an examination under oath. Since
18 the Division was not aware that Mr. Bersch and Mr. Wanzek did not monitor Concordia's financial
19 position until they testified at hearing, the Division could not have alleged this fraud theory prior to the
20 hearing. The Division argues that Mr. Bersch and Mr. Wanzek should not get "free passes" for this
21 fraud violation based on Mr. Bersch's invocation of his privilege against self-incrimination and Mr.
22 Wanzek's refusal to appear for an examination under oath.¹⁹¹³ The Division argues that failing to
23 consider this fraud violation would be contrary to the Act's "broad intent to sanction wrongdoing in
24 connection with the purchase or sale of securities."¹⁹¹⁴

25 ...

26 ...

27 ¹⁹¹² Exhs. S-2f, S-17e.

28 ¹⁹¹³ Division Reply Br. at 48.

¹⁹¹⁴ *Grand v. Nacchio*, 225 Ariz. 171, 174 ¶ 16, 236 P.3d 398, 401 (2010).

1 b) Analysis and Conclusion

2 The Division alleges a violation of A.R.S. § 44-1991(A)(2) based upon misrepresentations to
3 two investors by Mr. Bersch and Mr. Wanzek that they monitored the financial condition of Concordia.
4 This allegation was not raised by the Division prior to the filing of its Opening Post-Hearing Brief.
5 Although not specifically stated, we infer the Division makes a motion to conform the Amended Notice
6 to the evidence.

7 The Commission's rules allow for the amendment or correction of formal documents and
8 provide that "[f]ormal documents will be liberally construed and defects which do not affect substantial
9 rights of the parties will be disregarded."¹⁹¹⁵ Motions are to conform insofar as practicable with the
10 Arizona Rules of Civil Procedure.¹⁹¹⁶ The Arizona Rules of Civil Procedure apply when procedure is
11 not otherwise set forth by law, by the Commission's Rules of Practice and Procedure, or by regulations
12 or orders of the Commission.¹⁹¹⁷ Rule 15(b) permits theories of liability to be treated as if they were
13 raised in the pleadings when they are tried by the express or implied consent of the parties.¹⁹¹⁸ Rule
14 15(b) provides:

15 When issues not raised by the pleadings are tried by express or implied
16 consent of the parties, they shall be treated in all respects as if they had
17 been raised in the pleadings. Such amendment of the pleadings as may
18 be necessary to cause them to conform to the evidence and to raise these
19 issues may be made upon motion of any party at any time, even after
20 judgment, but failure so to amend does not affect the result of the trial of
21 these issues. If evidence is objected to at the trial on the ground that it is
22 not within the issues made by the pleadings, the court may allow the
23 pleadings to be amended and shall do so freely when the presentation of
24 the merits of the action will be subserved thereby and the objecting party
25 fails to satisfy the court that the admission of such evidence would

26
27 ¹⁹¹⁵ A.A.C. R14-3-106(E).

¹⁹¹⁶ A.A.C. R.14-3-106(K).

¹⁹¹⁷ A.A.C. R.14-3-101(A).

28 ¹⁹¹⁸ *Dietz v. Waller*, 141 Ariz. 107, 112, 685 P.2d 744, 749 (1984).

1 prejudice the party in maintaining the party's action or defense upon the
 2 merits. The court may grant a continuance to enable the objecting party
 3 to meet such evidence.¹⁹¹⁹

4 Amendments under Rule 15(b) allow a case to ultimately be tried on its merits and such
 5 amendments should be liberally allowed in the interests of justice.¹⁹²⁰ Whether an issue has been tried
 6 under Rule 15(b) will depend upon the facts of the case, but the record must have some affirmative
 7 showing that the unpleaded issue was reached.¹⁹²¹ A failure to object to the introduction of evidence
 8 on the ground that it is not within the issues sufficiently implies consent to try such issues.¹⁹²² However,
 9 permitting evidence relevant to an existing issue to be admitted without objection does not constitute
 10 implied consent to the trial of an issue which has not been raised.¹⁹²³ It would be error to refuse to
 11 allow an amendment of a pleading to conform to proof on the ground that the amendment would be a
 12 change in theory.¹⁹²⁴ If the amendment would cause prejudice or surprise, it may be properly
 13 refused.¹⁹²⁵ "Whether an issue has been tried with the implied consent of the parties depends upon
 14 whether the parties recognized that the unpleaded issue entered the case at trial, whether the evidence
 15 that supports the unpleaded issue was introduced at trial without objection, and whether a finding of
 16 trial by consent prejudiced the opposing party's opportunity to respond."¹⁹²⁶

17 At the hearing, Ms. LeMay testified that she received a letter from ER Financial ("ER Letter")
 18 addressed "To our Portfolio Investors," which stated that "When you have additional funds to invest in
 19 contract, please let us know so we can place in with [sic] Concordia as to earn 12%."¹⁹²⁷ The ER Letter
 20 further stated that "[a]s in the past, we also will monitor the financial position of Concordia."¹⁹²⁸ The
 21 ER Letter was undated and unsigned, but closed with the typewritten names of Mr. Bersch and Mr.

23 ¹⁹¹⁹ Ariz. R. Civ. P. 15(b). Rule 15(b) was subsequently amended, effective January 1, 2017.

24 ¹⁹²⁰ *Continental Nat'l Bank v. Evans*, 107 Ariz. 378, 381, 489 P.2d 15, 18 (1971).

25 ¹⁹²¹ *Hill v. Chubb Life American Ins. Co.*, 182 Ariz. 158, 161, 894 P.2d 701, 704 (1995).

26 ¹⁹²² *In re Estate of McCauley*, 101 Ariz. 8, 18, 415 P.2d 431, 441 (1966).

27 ¹⁹²³ *Magma Copper Co. v. Industrial Comm'n of Arizona*, 139 Ariz. 38, 47 (1983).

28 ¹⁹²⁴ *McCauley*, 101 Ariz. at 18, 415 P.2d at 431.

¹⁹²⁵ See *Bujanda v. Montgomery Ward & Co. Inc.*, 125 Ariz. 314, 316, 609 P.2d 584, 586 (App. 1980); *Eng v. Stein*, 123 Ariz. 343, 347, 599 P.2d 796, 800 (1979).

¹⁹²⁶ *United States v. Shanbaum*, 10 F.3d 305, 312–13 (5th Cir. 1994) (interpreting the similar federal rule, Fed.R.Civ.P. 15(b)).

¹⁹²⁷ Tr. at 287; Exh. S-2f.

¹⁹²⁸ *Id.*

1 Wanzek.¹⁹²⁹ The ER Respondents, noting that the ER Letter was unsigned and undated, objected to
 2 the admission of the ER Letter as to relevance.¹⁹³⁰ The Division argued that Ms. LeMay testified that
 3 it came from ER Financial and that the ER Letter was relevant in its impact upon Ms. LeMay's decision
 4 to make another investment.¹⁹³¹ The ER Letter was admitted into evidence by the Administrative Law
 5 Judge over the objection by the ER Respondents.¹⁹³² Ms. LeMay initially testified that she received
 6 the ER Letter in 2010, then stated she was not sure when, but she might have received it in 2009, then
 7 clarified that she received it "within a year or two" after making her Concordia investment in 2002,
 8 then later testified that the hand-written date of "9/20/06" on the ER Letter was written by her as being
 9 the date she had a conversation with either Mr. Bersch or Mr. Wanzek regarding a subsequent letter
 10 from Concordia that would have been received, according to the ER Letter, "in a few weeks."¹⁹³³ Mr.
 11 Dennison testified that he received the ER Letter on August 10, 2006.¹⁹³⁴

12 Later at the hearing, the Division elicited testimony from Mr. Wanzek as to whether he received
 13 Concordia's financial statements when he served on Concordia's board of directors from 2000 through
 14 2008.¹⁹³⁵ The testimony of Mr. Wanzek was that he received some financial statements, but he could
 15 not recall when.¹⁹³⁶ The Division questioned Mr. Bersch as to whether he received Concordia's
 16 financial statements as a member of Concordia's board of directors from 2000 through 2005.¹⁹³⁷
 17 Counsel for the ER Respondents objected that the Division's questioning "goes into what the legal
 18 duties of the board members are."¹⁹³⁸ The objection was overruled by the Administrative Law
 19 Judge.¹⁹³⁹ Mr. Bersch testified that he did not recall receiving financial statements while he was a
 20 member of Concordia's board of directors.¹⁹⁴⁰

21 Here, the ER Respondents cannot be deemed to have consented to trying the issue of monitoring
 22

23 ¹⁹²⁹ *Id.*

24 ¹⁹³⁰ Tr. at 288.

25 ¹⁹³¹ Tr. at 288-289.

26 ¹⁹³² Tr. at 289.

27 ¹⁹³³ Tr. at 286-290; Exh. S-2f.

28 ¹⁹³⁴ Tr. at 510-511; Exh. S-17e.

¹⁹³⁵ Tr. at 1637-1640.

¹⁹³⁶ *Id.*

¹⁹³⁷ Tr. at 1903-1904.

¹⁹³⁸ Tr. at 1903.

¹⁹³⁹ *Id.*

¹⁹⁴⁰ Tr. at 1903-1904.

1 Concordia's financial position. The ER Respondents objected to admission of the ER Letter into
2 evidence and objected to the Division's questions of Mr. Bersch regarding the issue of his receiving
3 financial statements. The Division never stated an intention of trying this issue until the filing of the
4 Division's Opening Post-Hearing Brief. Had the Division moved to amend the Notice to conform to
5 the evidence at the hearing, the ER Respondents would have been put on notice to address the new
6 charge, or request a continuance to present testimony or evidence. Instead, the ER Respondents had
7 no opportunity to present any defense to this allegation. Considering this new allegation would be
8 particularly prejudicial to the Respondents as Mr. Wanzek testified that he had received some
9 Concordia financial statements, but he could not recall the time periods of their receipt. With proper
10 notice, the ER Respondents may have been able to produce financial statements they received to admit
11 at the hearing, or other documents that could have refreshed Mr. Wanzek's recollection as to when he
12 received financial statements. We conclude that the ER Respondents did not have an opportunity to
13 present all of the relevant factual details regarding this alleged violation. Accordingly, we dismiss the
14 two allegations of fraud against ER Financial, Mr. Bersch, and Mr. Wanzek arising from
15 representations that they monitored Concordia's financial position.

16 8. Failure to Disclose Concordia's Losses and Financial Condition

17 In the Division's Opening Post-Hearing Brief, the Division alleges that Mr. Bersch failed to tell
18 Ms. Patricola prior to her investments, in April and November 2008, that: Concordia had suffered a net
19 loss in 2006; Concordia had a record number of voluntary repossessions between July 2007 and June
20 2008; three of Concordia's competitors shut their doors in January 2008; and Concordia had an excess
21 of inventory from repossessions while market prices were dropping.

22 The ER Respondents argue that there was no notice of this allegation prior to the hearing and
23 considering the allegation would violate due process. The ER Respondents argue that if this charge is
24 considered, the allegation is not factually supported.

25 The Division, in its Reply Brief, states that it agrees to withdraw this theory of fraud "in order
26 to reduce the issues on which these Respondents will inevitably appeal."¹⁹⁴¹ Accordingly, we dismiss
27

28 ¹⁹⁴¹ Division Reply Br. at 38.

1 the allegations of fraud against ER Financial, Mr. Bersch, and Mr. Wanzek arising from the failure to
2 disclose Concordia's losses and financial condition to Ms. Patricola.

3 F. Control Person Liability

4 The Division contends that Mr. Bersch and Mr. Wanzek are not only liable for their individual
5 violations of antifraud provisions, but they are jointly and severally liable as control persons for ER
6 Financials' antifraud violations. The ER Respondents present no arguments against the allegation of
7 control person liability.

8 Under A.R.S. § 44-1999(B), "Every person who, directly or indirectly, controls any person
9 liable for a violation of section 44-1991 or 44-1992 is liable jointly and severally with and to the same
10 extent as the controlled person to any person to whom the controlled person is liable unless the
11 controlling person acted in good faith and did not directly or indirectly induce the act underlying the
12 action." For the purposes of A.R.S. § 44-1999(B), a person may include an individual, corporation or
13 limited liability company.¹⁹⁴²

14 ER Financials' Articles of Organization reserved management of the limited liability company
15 to its members, Mr. Bersch and Mr. Wanzek.¹⁹⁴³ Mr. Wanzek testified that he and Mr. Bersch, as the
16 sole members of ER Financial, had the legal power to control the entity's activities.¹⁹⁴⁴ Accordingly,
17 we find that Mr. Bersch and Mr. Wanzek are liable as control persons for the antifraud violations of
18 ER Financial, pursuant to A.R.S. § 44-1999(B).

19 G. Marital Community Liability

20 The Division contends that the marital community of David and Linda Wanzek is subject to
21 liability under the Act. The ER Respondents argue that the Commission has no jurisdiction over the
22 marital community as the Wanzeks are residents of Florida. As we determined, *supra*, the Wanzeks
23 possess community property from which a community obligation may be satisfied, and the Commission
24 has jurisdiction to consider claims against the community.

25 The ER Respondents contend that Mrs. Wanzek had no involvement with Concordia. This
26 asserted defense is irrelevant as the Division's claim against the marital community arises from the

27 ¹⁹⁴² A.R.S. § 44-1801(17).

28 ¹⁹⁴³ Exh. S-166.

¹⁹⁴⁴ Tr. at 1706.

1 actions of Mr. Wanzek. As we noted above, a debt incurred by a spouse is presumed to be an obligation
2 of the marital community unless the presumption is overcome by clear and convincing evidence.¹⁹⁴⁵
3 The ER Respondents cite no evidence that would overcome the presumption of liability of the marital
4 community.

5 H. Remedies

6 The Division argues that the Commission has broad authority to order respondents to remedy
7 violations of the Act. The Division contends that the Respondents should pay restitution and
8 administrative penalties for their violations of the Act. The Division also seeks the entry of a cease
9 and desist order against the Respondents for future violations.

10 The Division asserts that 59 investors, who invested in Concordia through Mr. Bersch, Mr.
11 Wanzek, and ER Financial, have not been repaid a total of \$2,643,939.65 of the principal they invested.
12 The Division contends that: Mr. Bersch was the salesmen for 28 investors, who are owed
13 \$1,129,530.21; Mr. Wanzek was the salesman for 19 investors, who are owed \$946,111.35; and,
14 although no individual salesman was identified in the record, ER Financial sold to the remaining 12
15 investors, who are owed \$568,298.09.¹⁹⁴⁶

16 The Division argues that, pursuant to A.R.S. §§ 44-2032(1) and 44-2003(A), Concordia and ER
17 Financial should be ordered to pay restitution of \$2,643,939.65 jointly and severally. The Division
18 contends that Mr. Bersch and Mr. Wanzek should be ordered to pay restitution for their violation of the
19 registration statutes, A.R.S. §§ 44-1841 and 44-1842: \$1,129,530.21 for Mr. Bersch, jointly and
20 severally with Concordia and ER Financial; and \$946,111.35 for Mr. Wanzek, jointly and severally
21 with Concordia and ER Financial. The Division further contends that Mr. Bersch and Mr. Wanzek, as
22 primary violators of the antifraud provisions of A.R.S. § 44-1991(A), and as control persons of ER
23 Financial, who violated A.R.S. § 44-1991(A) for all 132 investment contracts, should be ordered jointly
24 and severally liable with ER Financial for its violations of A.R.S. § 44-1991(A).

25 The ER Respondents argue that the Division has failed to meet its burden of proof to establish
26
27

28 ¹⁹⁴⁵ *Hrudka*, 186 Ariz. at 91-92, 919 P.2d at 186-187.

¹⁹⁴⁶ Exh. S-194 at 3 of 3.

1 the restitution it seeks.¹⁹⁴⁷ The ER Respondents contend that the data summary¹⁹⁴⁸ relied upon by the
2 Division is inaccurate and unreliable, failing to account for millions of dollars paid by Concordia
3 through 2003.¹⁹⁴⁹ The ER Respondents further contend that the Division's calculations fail to take into
4 consideration the principal reduction and release in the Second Amendments. The ER Respondents
5 contend that the Second Amendments were valid contracts that reduced the amount to zero owed to
6 any investors.

7 The ER Respondents note many other flaws of the Division's data summary: it fails to consider
8 tax benefits received by many of the investors; it includes restitution for investors who testified they
9 did not want it; it includes restitution to Lisa Fuhrman, who actively participated in selling the
10 Concordia investments; the list of salespeople excludes Lisa Fuhrman, Ken Crowder, Chris Crowder,
11 Randy Albers, and Charles Buttke; it excludes some family members of the Respondents but not the
12 Farmers, who are Mr. Bersch's sister and brother-in-law;¹⁹⁵⁰ it fails to reflect withdrawals, such as
13 those paid to Ms. Hodel; it fails to combine the Guest and Singleton family groups.

14 The ER Respondents further contend that the data summary was prepared by a forensic
15 accountant, Mr. Beliak, but the Division failed to follow the rules required for an expert witness. The
16 ER Respondents note that an expert witness has "scientific, technical, or other specialized knowledge"
17 and is "qualified by knowledge, skill, experience, training or education."¹⁹⁵¹ The ER Respondents
18 contend that Mr. Beliak is a trained and certified forensic accountant whose data summary was based
19 upon his review of historical financial records and required tens of thousands of data points. The ER
20 Respondents quote Mr. Beliak's testimony:

21 Q: Did you prepare the Exhibit S-194 using the standards and
22 processes and procedures that you would use when preparing an
23 expert report as a certified public accountant?

24 A: I used my education, experience and background to summarize
25

26 ¹⁹⁴⁷ In addition to raising arguments in its closing brief on this issue, Concordia has submitted notice of joinder to those
arguments raised by the ER Respondents. Concordia's Joinder.

27 ¹⁹⁴⁸ Exh. S-194.

28 ¹⁹⁴⁹ ER Respondents Br. at 71, citing Tr. at 1128-1131, 2456.

¹⁹⁵⁰ Tr. at 1127.

¹⁹⁵¹ ER Respondents Br. at 72, citing Ariz. R. Evid. 702.

1 the information that was provided to me. I did not approach it
2 any differently than whether I'm called as an expert or not, you
3 know. My position is to bring the information and summarize it
4 as accurately as I can.

5 Q: All right. So there would be no difference between what this
6 report shows if you had produced it as an expert and what we
7 actually have here. Fair to say?

8 A: There would be no difference.¹⁹⁵²

9 The ER Respondents argue that the Division is required to disclose the entire case file of each
10 testifying expert.¹⁹⁵³ The ER Respondents argue that the Division realized this and disclosed Mr.
11 Beliak's case file when the Division submitted his original summary, Exhibit S-172, in April 2015.
12 The ER Respondents contend that when Mr. Beliak created a new summary and testified in December
13 2016, the Division did not provide access to his updated case file, instead claiming he was a lay witness
14 and refusing to disclose any additional documents. The ER Respondents contend that Exhibit S-194
15 should not be considered because of the Division's evasion of its disclosure requirements.

16 The ER Respondents further note that if Concordia's Exhibit C-24 was used as an alternative,
17 that document contains many of the same flaws including the failure to consider payments before 2003,
18 failure to give effect to the Second Amendment, and failure to consider tax benefits.

19 The ER Respondents and Concordia argue that the Commission, pursuant to A.A.C. R14-4-
20 308(C)(5), may consider the ability to pay when awarding restitution. The ER Respondents note that
21 the un rebutted testimony of Mr. Bersch and Mr. Wanzek was that they had limited assets and could not
22 afford to pay millions of dollars in restitution.¹⁹⁵⁴ The ER Respondents also cite the following as
23 mitigating factors: 1) Mr. Bersch and Mr. Wanzek "tried to do everything correctly, and they did not
24 intentionally commit any violations;" 2) "the claims in this matter are very stale;" 3) overall, the
25 investors received over \$5.4 million more than they invested; 4) Mr. Bersch and Mr. Wanzek "have
26 strong character and are deeply involved in their communities and have exceptional reputations;" 5)

27 ¹⁹⁵² Tr. at 1055.

28 ¹⁹⁵³ ER Respondents Br. at 72, citing *Slade v. Schneider*, 212 Ariz. 176, 180 ¶ 25, 129 P.3d 465, 469 (App. 2006).

¹⁹⁵⁴ Tr. at 1623-1626, 1760-1761.

1 this case “has caused a heavy burden of stress on [Mr. Bersch and Mr. Wanzek];”¹⁹⁵⁵ and 6) Mr. Bersch
2 and Mr. Wanzek have paid extensive attorney’s fees in their defense.

3 Concordia contends that it cannot pay a restitution order and, at the time of the hearing, its sole
4 asset was a pool of sub-prime used truck loans with a face-value of approximately \$2.45 million.¹⁹⁵⁶
5 Concordia notes that its assets have continued to shrink through the costs of litigation and that, if forced
6 to liquidate through bankruptcy, the truck loans would sell for “a minute percentage that would be
7 consumed by bankruptcy costs, senior administrative and priority claims, and senior creditors.”¹⁹⁵⁷
8 Concordia contends that labeling the Conditional Sales Contracts as securities would subordinate them
9 to most other creditor claims in bankruptcy,¹⁹⁵⁸ resulting in little or no recovery from a restitution or
10 penalty order. Concordia contends that at the time of the hearing it could afford a restitution order of
11 approximately \$75,000, assuming no subsequent legal expenses following the hearing.¹⁹⁵⁹

12 Concordia argues that the investors were mostly wealthy individuals, sophisticated, many of
13 whom met the qualifications for being accredited investors. Concordia notes that very few of the
14 investors testified at the hearing.

15 Concordia lists the following factors as further bases for finding the Division’s restitution
16 request inappropriate:

- 17 • The majority of investors made money or received their investment
18 back;¹⁹⁶⁰
- 19 • Concordia paid out more investment money than it received;¹⁹⁶¹
- 20 • Concordia closed the window to new investments when too many came
21 in and declined purchase requests;¹⁹⁶²
- 22 • Concordia refunded money upon request until the Great Recession made
23 that financially impossible;

25 ¹⁹⁵⁵ Tr. at 1627-1629; 1762.

26 ¹⁹⁵⁶ Tr. at 2451.

27 ¹⁹⁵⁷ Concordia Br. at 19-20, citing Tr. at 925, 928-929, 2450-2452.

28 ¹⁹⁵⁸ Id. at 20, citing 11 U.S.C. 510 and *In re Del Biaggio*, 834 F.3d 1003, 1011 (9th Cir. 2016).

¹⁹⁵⁹ Tr. at 2454.

¹⁹⁶⁰ Tr. at 2408.

¹⁹⁶¹ Tr. at 2408; Exh. S-194.

¹⁹⁶² Tr. at 1630.

- 1 • This action was filed years after the fact, and after years of open activity;
- 2 • When expanding in 2006, under Mr. Crowder, Concordia conservatively
- 3 increased its loan loss reserve to about \$3.59 million and maintained its
- 4 cash position to just over \$2 million to appropriately protect against
- 5 future losses that could otherwise have been distributed as income;
- 6 • What the Division labels as misrepresentation of Concordia's 2006
- 7 financial condition was, instead, prudent business judgment attesting to
- 8 Concordia's conservative accounting practices;
- 9 • Concordia avoided filing Chapter 7 bankruptcy twice to instead make
- 10 timely, monthly payments back to investors at a much higher amount
- 11 than had it filed Chapter 7 bankruptcy and liquidated;
- 12 • Concordia designed the amendments to maximize the return to the
- 13 investors and keep timely, monthly payments at the amounts to which
- 14 investors were accustomed and a majority preferred;
- 15 • Concordia cut its staff from 30 to 7;
- 16 • Mr. Crowder took on, and still maintains, the roles of multiple
- 17 employees;
- 18 • Mr. Crowder cut his pay for years, and only reinstituted his 2006 salary
- 19 after investors received their 45% pursuant to the Second Amendment
- 20 and following additional downsizing;
- 21 • Concordia twice renegotiated its office lease and twice relocated to
- 22 smaller office space;
- 23 • Concordia reviewed and cut costs on everything it could;¹⁹⁶³
- 24 • Concordia created quarterly newsletters to provide timely company
- 25 updates and financial information to investors, even though it was bad
- 26 news;
- 27

28 ¹⁹⁶³ Tr. at 2394-2395.

- 1 • Concordia tried to take on new business by servicing debt for third
- 2 parties as a way to generate additional revenue;
- 3 • Concordia tried to find institutional investors for a separate company for
- 4 which it could provide loan servicing as a way to generate additional
- 5 revenue;
- 6 • Mr. Crowder met with, and took personal phone calls from, investors to
- 7 explain efforts to cut costs and the financial situation, with an
- 8 acknowledgment that bankruptcy was possible;
- 9 • Mr. Crowder provided his cell phone number to investors;¹⁹⁶⁴
- 10 • All but 30 of Concordia's investors outperformed the market during a
- 11 historic economic collapse;¹⁹⁶⁵
- 12 • The investors understood, by acknowledgment and notice, that this was
- 13 a high-risk investment;
- 14 • The Division did not bring claims against its own witnesses who sold
- 15 these investments, Sunset Financial and Lisa Fuhrman;¹⁹⁶⁶
- 16 • A member of a Federal Reserve Bank board of directors reviewed and
- 17 sold these investments without seeing issue;
- 18 • A registered broker-dealer reviewed and sold the Concordia investments
- 19 without seeing issue;
- 20 • Even the investors understood that the amendments and payouts were
- 21 more prudent than bankruptcy.¹⁹⁶⁷

22 Concordia further argues that the Division has failed to provide sufficient evidence for its
 23 requested restitution order. Concordia notes that Ms. Hodel testified to having received interest
 24 payments back to 1999, received more than her initial principal, and had documentary proof that the
 25 Division never requested to see.¹⁹⁶⁸ Concordia argues that the Division's accountant refused to credit

26 ¹⁹⁶⁴ Ex. C-21 at C000171.

27 ¹⁹⁶⁵ Tr. at 2448; Exh. C-24.

¹⁹⁶⁶ Tr. at 720, 1473.

¹⁹⁶⁷ Tr. at 757, 2077, 2155.

28 ¹⁹⁶⁸ Tr. at 973-974, 981, 1001, 1014, 1490.

any payments not documented on a ledger and did not account for over \$24,000 paid to the Hodels in 2004, which Ms. Hodel acknowledged receiving.¹⁹⁶⁹ Concordia argues that auditors found no missing payments to investors. With simple math, Concordia contends that payments to the Hodels in 1999 on their investment of \$75,000 at 12% interest for the sixteen months from November 1999 through February 2001, at \$900 per month, would total \$14,400.¹⁹⁷⁰ Concordia argues that the \$14,400 total from this sixteen-month period, combined with the 2004 payments of \$24,000, totaling \$38,400, exceeds the Division's claimed principal amount owed to the Hodels of \$35,953.09.¹⁹⁷¹

Concordia also contends that the Division failed to offset gains of over \$50,000 to one account of investor Jack Guest against another account of his that suffered losses, even though Mr. Guest informed the Division that he was the investor for both accounts.¹⁹⁷² Concordia further contends that restitution requested for the Bachmann Trust account and the Schuringa Charitable Trust account includes over \$100,000 in omitted principal payments made prior to 2004.¹⁹⁷³ Additionally, Concordia argues that the Division erroneously requests \$90,000 in principal payments for insiders, the Farmers, who are Mr. Bersch's relatives, and Lisa Fuhrman, who sold Concordia investments. Concordia argues that the Division's restitution request should be rejected as the evidence shows that the Division failed to apply reliable standards for determining offsets, designating insiders, and refusing to account for interest paid for a period of years.

Concordia further argues that: this matter was caused by the Great Recession; the Division refuses to acknowledge that others have received commissions from Concordia in addition to ER Financial; the Division uses the term "duress" in spite of financial reality and the term's legal definition; and that the Division falsely asserts that Concordia sought to raise new investor money.

In its Reply Brief, the Division argues that the Commission has broad authority to order the Respondents to remedy their violations of the Act, "including, without limitation, a requirement to

¹⁹⁶⁹ Tr. at 990-991, 1112-1113; Exh. C-28 at C001571.

¹⁹⁷⁰ By our math, the monthly payment on a \$75,000 investment paying 12% annually would be \$750, for a sixteen-month total of \$12,000.

¹⁹⁷¹ We note that our lesser calculation of \$12,000 paid over sixteen months, when added to the \$24,000, also exceeds the claim of \$35,953.09.

¹⁹⁷² Tr. at 1092-1093, 1502-1503; Exh. S-181 at ACC013100-ACC013101.

¹⁹⁷³ Exh. S-181 at ACC013076, at ACC013258.

1 provide restitution as prescribed by the rules of the [C]ommission.”¹⁹⁷⁴ The Division contends that
 2 ordering violators of the Act to make their victims whole by paying restitution advances the Act’s
 3 remedial purposes and investor protection. The Division quotes the Arizona Court of Appeals for the
 4 proposition that “[r]equiring the [violators] to make restitution to the victims has a deterrent effect,
 5 which also serves the public interest.”¹⁹⁷⁵

6 The Division contends that Concordia offered Exhibit C-24 to rebut the Division’s financial
 7 data summary finding \$2.643 million of principal is owed to 59 investors. The Division notes that the
 8 ER Respondents did not object to Concordia’s introduction of Exhibit C-24.¹⁹⁷⁶ The Division contends
 9 that while Mr. Dekmejian, who prepared Exhibit C-24, admitted mistakes and inaccuracies therein, the
 10 Commission should order restitution of at least \$2,296,185.15, the amount conceded in Exhibit C-
 11 24.¹⁹⁷⁷

12 The Division contends that its forensic accountant, Mr. Beliak, prepared Exhibit S-194 from
 13 investment documents, ledgers and spreadsheets produced by Concordia in response to a subpoena
 14 duces tecum of the State of California.¹⁹⁷⁸ The Division asserts that Mr. Beliak determined the amounts
 15 Concordia repaid investors by examining Concordia’s account ledgers and spreadsheets, which
 16 sometimes presented conflicting information.¹⁹⁷⁹ The Division states that Mr. Beliak used the ledgers
 17 as the best available evidence because the ledgers documented dates, check numbers and amounts of
 18 payments Concordia sent to investors while the spreadsheets just identified amounts without check
 19 numbers.¹⁹⁸⁰ The Division asserts that Mr. Beliak used the spreadsheets to credit payments when
 20 ledgers were not available.¹⁹⁸¹ The Division notes that in many instances Mr. Beliak determined
 21 investors were owed less principal than Concordia calculated.¹⁹⁸² The Division contends that it tried
 22 to reconcile the differences between S-194 and C-24 by requesting information from Concordia, but
 23

24 ¹⁹⁷⁴ A.R.S. § 44-2032(1), A.A.C. R14-4-308(A) and (C).

25 ¹⁹⁷⁵ *Trimble*, 152 Ariz at 556, 733 P.2d at 1139.

¹⁹⁷⁶ Tr. at 2411-2422.

26 ¹⁹⁷⁷ Tr. at 2413-2414, 2415, 2417, 2420-2421. Exh. C-24.

¹⁹⁷⁸ Tr. at 1028, 1033-1034, 1140, 1224-1225; Exhs. S-181, S-182.

27 ¹⁹⁷⁹ Tr. at 1033-1034, 1077, 1107, 1123-1125.

¹⁹⁸⁰ Tr. at 1033-1034, 1107.

28 ¹⁹⁸¹ Tr. at 1107-1108.

¹⁹⁸² Tr. at 1038; Exh. S-194 at Tab 1A.

1 Concordia failed to provide it.¹⁹⁸³

2 The Division argues that Exhibit S-194 was accurate as to the date it was prepared based upon
3 the documents produced by Concordia, with Concordia only having provided ledgers and spreadsheets
4 for some of the time period at issue and the ER Respondents providing no evidence of repayments to
5 investors. The Division denies the Respondents' allegation that Mr. Beliak made judgment calls about
6 repayment amounts to credit, stating instead that he relied upon the evidence provided by Concordia.
7 The Division argues that because payment is an affirmative defense, the Respondents bore the burden
8 to prove payments they made.¹⁹⁸⁴ The Division contends that the Respondents' failure to keep records
9 of some payments it made should not be used to harm investors. The Division contends that it is not
10 refusing to credit the Respondents for payments made from 1998 through 2003, and, pursuant to A.A.C.
11 R14-4-308(C), they can be credited for any payments they can verify they made.

12 The Division contends that its restitution request does not take into account the Second
13 Amendments, which purported to reduce principal amounts owed to investors by 55% and release
14 Concordia and its agents from liability, because the Second Amendments are void and of no effect
15 because of the Act's anti-waiver statute, A.R.S. § 44-2000.¹⁹⁸⁵ Citing an Arizona District Court
16 opinion, the Division argues that the legislature enacted A.R.S. § 44-2000 to prevent sellers of
17 securities from using contractual waivers to narrow investor protection under the Act.¹⁹⁸⁶ The Division
18 argues that the Second Amendments have no effect upon the Commission's authority to order the
19 Respondents to repay full restitution to the investors.

20 The Division argues that investment losses are not "tax benefits" and the Respondents cite no
21 authority for their contention that purported tax benefits should offset the restitution owed. Further,
22 the Division contends that the Commission's Rule governing restitution, A.A.C. R14-4-308(C), does
23

24 _____
¹⁹⁸³ Tr. at 1118.

25 ¹⁹⁸⁴ Division Reply Br. at 86, citing *B & R Materials, Inc. v. U. S. Fid. & Guar. Co.*, 132 Ariz. 122, 124, 644 P.2d 276, 278
26 (App. 1982) ("Payment is an affirmative defense which must be pled and the burden is upon the defendant to prove payment
with some affirmative evidence").

¹⁹⁸⁵ A.R.S. § 44-2000. **Contrary stipulations void**

27 Any condition, stipulation or provision binding any person acquiring any security to waive compliance with this chapter or
chapter 13 of this title or of the rules of the commission is void.

28 ¹⁹⁸⁶ Division Reply Br. at 87, citing *R & L Ltd. Investments, Inc. v. Cabot Inv. Properties, LLC*, 729 F. Supp. 2d 1110, 1113
(D. Ariz. 2010).

1 not provide for a respondent to be credited for tax benefits received by an investor.¹⁹⁸⁷

2 Regarding the Respondents' contention that the Division seeks restitution for some investors
3 who do not want restitution, the Division notes that the Commission generally orders funds refused by
4 an investor to be disbursed, *pro rata*, to the remaining investors.

5 The Division argues the irrelevance of Respondents' contentions that some salespeople who
6 sold Concordia investments are not included in Exhibit S-194, and that one salesman, Ms. Fuhrman, is
7 listed to receive restitution. The Division contends that these people are not respondents. The Division
8 argues that the Division and the Commission have broad discretion in enforcing the Act, quoting the
9 Arizona Court of Appeals in a criminal case:

10 [I]t is within the prosecuting attorney's discretion to file charges or refuse
11 to charge for reasons other than the mere ability to establish guilt. He
12 may consider a wide range of factors in addition to the strength of the
13 state's case in deciding whether prosecution would be in the public
14 interest.¹⁹⁸⁸

15 Accordingly, the Division contends that whether others sold Concordia investments "does not excuse
16 Respondents' sales or mitigate their violations."¹⁹⁸⁹

17 The Division notes that the Respondents "complain that [Exhibit] S-194 does not group
18 investments by members of the Guest family or the Singleton family."¹⁹⁹⁰ The Division asserts that
19 this contention is irrelevant as the Respondents failed to cite any evidence in the record to support a
20 claim that these families should be grouped together.

21 Regarding Mr. Beliak, the Division contends that he was not an expert witness and he did not
22

23 ¹⁹⁸⁷ A.A.C. R14-4-308 provides, in pertinent part:

C. If restitution is ordered by the Commission,

24 1. The amount payable as damages to each purchaser shall include:

25 a. Cash equal to the fair market value of the consideration paid, determined as of the date such payment was originally paid
by the buyer; together with

26 b. Interest at a rate pursuant to A.R.S. § 44-1201 for the period from the date of the purchase payment to the date of
repayment; less

c. The amount of any principal, interest, or other distributions received on the security for the period from the date of
purchase payment to the date of repayment.

27 ¹⁹⁸⁸ *State v. Buchholz*, 139 Ariz. 303, 309, 678 P.2d 488, 494 (App. 1983) (internal quotation omitted).

¹⁹⁸⁹ Division Reply Br. at 89.

28 ¹⁹⁹⁰ *Id.*

1 submit an expert report. The Division notes that an expert witness is one who testifies “in the form of
 2 an opinion.”¹⁹⁹¹ The Division argues that “[h]aving certain knowledge, skill, experience, training or
 3 education does not convert a fact or summary witness into an expert witness if the witness does not
 4 testify in the form of an opinion.”¹⁹⁹² The Division contends that Mr. Beliak testified as a fact witness
 5 who summarized the voluminous documents produced by Concordia regarding investments and
 6 repayments to investors. The Division argues that Exhibit S-194 “was a summary of those documents,
 7 not an expert report containing opinions” and “[t]he Division did not ask Mr. Beliak his opinion on
 8 anything.”¹⁹⁹³ The Division contends that, when the Respondents attempted to characterize Mr. Beliak
 9 as an expert witness at the hearing, the Administrative Law Judge correctly ruled that Mr. Beliak “has
 10 not been brought forth as an expert witness.”¹⁹⁹⁴ The Division further denies the Respondents’
 11 assertion that the Division refused to disclose additional documents when Mr. Beliak updated his
 12 summary. The Division argues that it sent an email to Respondents’ counsel on December 5, 2016,
 13 that updated the list of documents reviewed by Mr. Beliak, as Division counsel stated on the record
 14 and Respondents’ counsel acknowledged.¹⁹⁹⁵ The Division notes that the Administrative Law Judge
 15 found that “the documents that went into the summary [S-194] have been produced.”¹⁹⁹⁶

16 The Division argues that full-restitution should be ordered against the Respondents to the 59
 17 investors to whom are owed \$2,643,939.65.¹⁹⁹⁷ The Division cites the United States Supreme Court:
 18 “[I]t is well settled that once the Government has successfully borne the considerable burden of
 19 establishing a violation of law, all doubts as to the remedy are to be resolved in its favor.”¹⁹⁹⁸ The
 20 Division acknowledges that the Commission has discretion to reduce a restitution obligation “if
 21 necessary or appropriate to the public interest and consistent with the protection of investors.”¹⁹⁹⁹ The
 22 Division contends that reducing the Respondents’ restitution obligations would undermine investor
 23

24 ¹⁹⁹¹ Quoting *Ariz. R. Evid.* 702.

25 ¹⁹⁹² Division Reply Br. at 89.

26 ¹⁹⁹³ *Id.*

27 ¹⁹⁹⁴ *Id.* at 90, citing Tr. at 1071-1075.

28 ¹⁹⁹⁵ Tr. at 1073.

¹⁹⁹⁶ Tr. at 1074-1075.

¹⁹⁹⁷ Exh. S-194 at page 3 of 3.

¹⁹⁹⁸ *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 170–71, 124 S. Ct. 2359, 2370, 159 L. Ed. 2d 226 (2004)
 (internal quotation omitted).

¹⁹⁹⁹ A.A.C. R14-4-308(C)(5).

1 protection and be contrary to the public interest.

2 The Division notes that Mr. Bersch, Mr. Wanzek, and ER Financial made over \$3.09
3 million.²⁰⁰⁰ The Division further states that from 2006 to 2016, Concordia paid Mr. Chris Crowder²⁰⁰¹
4 and Mr. Dekmejian²⁰⁰² over \$1.7 million each, while Concordia lost more than \$13.8 million from 2006
5 to 2014.²⁰⁰³ The Division contends that the sums paid to Mr. Chris Crowder and Mr. Dekmejian show
6 that they were not working to maximize the funds Concordia could return to investors, but rather, they
7 “did not want their gravy train to end.”²⁰⁰⁴ The Division argues that if Concordia goes bankrupt, it “is
8 not surprising given how much compensation [Mr. Chris] Crowder and [Mr.] Dekmejian have paid
9 themselves.”²⁰⁰⁵ Should any of the Respondents file for bankruptcy, the Division notes that a
10 Commission order for restitution is non-dischargeable.²⁰⁰⁶

11 The Division further cites numerous aggravating factors supporting the order of significant
12 penalties against the Respondents:

- 13 • Mr. Chris Crowder had no interest in knowing what Mr. Bersch, Mr.
14 Wanzek, and ER Financial told investors.²⁰⁰⁷
- 15 • Concordia did not supervise how Mr. Bersch, Mr. Wanzek, and ER
16 Financial marketed the Concordia investments.²⁰⁰⁸
- 17 • Concordia did nothing to determine if an investor had the financial
18 wherewithal to invest.²⁰⁰⁹
- 19 • Mr. Bersch and Mr. Wanzek misrepresented to investors that they
20 monitored Concordia’s financial position for the investors.²⁰¹⁰
- 21 • Mr. Chris Crowder periodically took money for himself from
22

23 ²⁰⁰⁰ Exh. S-194 at pages 1-2 of 3.

24 ²⁰⁰¹ Tr. at 539-540, 623-624, 2500, 2508, 2511.

²⁰⁰² Tr. at 2505-2507, 2509, 2512-2516; Exh. S-164 at ACC011898, ACC011901, ACC011903.

25 ²⁰⁰³ Exh. ER-2 at C000053, C000055-C000056, C000122, C000134, C000141, C000159, C000164.

²⁰⁰⁴ Division Reply Br. at 93.

26 ²⁰⁰⁵ *Id.*

²⁰⁰⁶ *Id.* citing 11 U.S.C. 523(a)(19).

27 ²⁰⁰⁷ Tr. at 94, 130.

²⁰⁰⁸ Tr. at 129.

²⁰⁰⁹ Tr. at 96-97.

28 ²⁰¹⁰ Tr. at 510, 1637-1640, 1903-1904; Exhs. S-2f, S-2h, S-17e.

Concordia's petty cash.²⁰¹¹ He also used his company credit card for personal items.²⁰¹² Mr. Chris Crowder's misappropriation of Concordia's funds for personal use became bad enough that Mr. Dekmejian made him enter a repayment agreement.²⁰¹³

- Mr. Chris Crowder, in blaming the economy for Concordia's financial condition, wrote investors that "Concordia was in a good position back in December of 2006,"²⁰¹⁴ but did not inform them that Concordia's December 31, 2006 financial statement showed an \$838,186 net loss.
- Concordia threatened to, and did, withhold monthly payments owed to investors to force them to sign the First Amendment.²⁰¹⁵
- In 2010, Mr. Chris Crowder and Mr. Dekmejian attempted to raise more money for Concordia without disclosing it was nearly bankrupt, instead misrepresenting that Concordia had "a portfolio with stellar performance."²⁰¹⁶
- In November 2010, without the investors' permission, Concordia instructed ER Financial to return the vehicle titles, which purportedly served as the investors' collateral,²⁰¹⁷ to Concordia.²⁰¹⁸ When Mr. Wanzek sent the vehicle titles to Concordia, the investors' purported collateral was gone²⁰¹⁹ and the Respondents had breached Sections 4.1, 4.2, and 4.3 of the Servicing Agreement and Section 4 of the Custodial Agreement.²⁰²⁰
- Starting in December 2011, Concordia threatened to not return any more

²⁰¹¹ Tr. at 1883.

²⁰¹² Tr. at 1883-1884.

²⁰¹³ *Id.*

²⁰¹⁴ Tr. at 182-183; Exh. S-2i.

²⁰¹⁵ Tr. at 299-302, 516-517, 565-566; Exhs. S-2k, S-2l.

²⁰¹⁶ Exh. ER-15 at ACC011566.

²⁰¹⁷ Tr. at 1696, 1753.

²⁰¹⁸ Exh. S-161 at ¶ 4.

²⁰¹⁹ Tr. at 1697.

²⁰²⁰ *See, e.g.*, Exhs. S-12a, S-12b.

of the investors' principal unless the investors agreed to forego 55% of the balance due and signed releases purportedly absolving the Respondents of any liability.²⁰²¹

- Not long after imposing the Second Amendment, Mr. Chris Crowder raised his six-figure salary by 40%.²⁰²²

Additionally, the Division contends that Mr. Bersch and Mr. Wanzek terminated ER Financial in response to the Division's investigatory subpoena for ER Financial's records.²⁰²³ The Division asserts that the ER Respondents have concealed and refused to produce at least one thousand pages of ER Financial's documents held by their counsel.²⁰²⁴ The Division notes that Mr. Bersch invoked his privilege against self-incrimination when asked whether he purposely terminated ER Financial to frustrate the Division's investigation and whether he destroyed or directed another to destroy ER Financial's records after being served with the Division's subpoena.²⁰²⁵ The Division contends that, based on Mr. Bersch's invocation of his privilege against self-incrimination, the Commission should draw an adverse inference against the ER Respondents that they destroyed ER Financial's records to frustrate the Division's investigation.²⁰²⁶

1. Restitution

The Commission has the authority to order restitution pursuant to A.R.S. § 44-2032.²⁰²⁷ If the Commission orders restitution, each purchaser shall receive:

- Cash equal to the fair market value of the consideration paid, determined

²⁰²¹ Tr. at 587-588.

²⁰²² Tr. at 624-625.

²⁰²³ Exh. S-168.

²⁰²⁴ Tr. at 1600, 1653-1654.

²⁰²⁵ Exh. S-173 at 32, 34-35.

²⁰²⁶ Citing, e.g., *Baxter v. Palmigiano*, 425 U.S. 308, 316-319, 96 S. Ct. 1551, 1557-1558, 47 L. Ed. 2d 810 (1976); *Curtis v. M&S Petroleum, Inc.*, 174 F.3d 661, 673-675 (5th Cir. 1999) (fact-finder may draw an adverse inference against a party from the assertion of the Fifth Amendment privilege by a witness whose interests are aligned, such as the party's agents or representatives).

²⁰²⁷ A.R.S. § 44-2032 provides, in pertinent part:

If it appears to the commission, either on complaint or otherwise, that any person has engaged in, is engaging in or is about to engage in any act, practice or transaction that constitutes a violation of this chapter, or any rule or order of the commission under this chapter, the commission, in its discretion may:

1. Issue an order directing such person to cease and desist from engaging in the act, practice or transaction, or doing any other act in furtherance of the act, practice or transaction, and to take appropriate affirmative action within a reasonable period of time, as prescribed by the commission, to correct the conditions resulting from the act, practice or transaction including, without limitation, a requirement to provide restitution as prescribed by rules of the commission. ...

as of the date such payment was originally paid by the buyer; together with

- b. Interest at a rate pursuant to A.R.S. § 44-1201 for the period from the date of the purchase payment to the date of repayment; less
- c. The amount of any principal, interest, or other distributions received on the security for the period from the date of purchase payment to the date of repayment.²⁰²⁸

The Commission may order alternative restitution terms based on the circumstances of the respondent and the purchasers, if necessary or appropriate to the public interest and consistent with the protection of the investors, including specifying a lesser amount of restitution if the respondent lacks sufficient assets.²⁰²⁹

The Respondents have challenged the restitution amounts proffered by the Division, which are derived from the summary of Mr. Beliak, Exhibit S-194. The Respondents contend that Exhibit S-194 was improperly submitted by the Division as Mr. Beliak was not treated as an expert witness. At the hearing, the Division argued, and the Administrative Law Judge accepted, that Exhibit S-194 was being offered as a summary pursuant to Rule 1006 of the Arizona Rules of Evidence.²⁰³⁰ Rule 1006 provides:

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

“A witness may summarize the information contained in voluminous reports or records as long as the information contained in the documents would be admissible and the documents are made available to the opposing party for their inspection.”²⁰³¹ “[T]he purpose of Rule 1006 is to give parties an

²⁰²⁸ A.A.C. R14-4-308(C)(1).

²⁰²⁹ A.A.C. R14-4-308(C)(5).

²⁰³⁰ Tr. at 1074-1075.

²⁰³¹ *Rayner v. Stauffer Chem. Co.*, 120 Ariz. 328, 333-334, 585 P.2d 1240, 1245-1246 (App. 1978).

1 opportunity to detect and prepare for inaccurate summaries.”²⁰³²

2 Rule 1006 does not impose any restriction upon persons who prepare a summary, nor does the
3 rule require that summaries be prepared by persons qualified as experts. The record demonstrates that
4 the Respondents were provided with the documents that Mr. Beliak used to prepare the summary.²⁰³³
5 Mr. Beliak’s summary was based upon payment records submitted to the Division by Concordia.²⁰³⁴

6 Under A.A.C. R14-4-308(C)(1), we award restitution to investors based upon their investment
7 less payments they received. We find that the Division has established, by a preponderance of the
8 evidence, that Exhibit S-194 is the best evidence of restitution owed to Concordia investors. By
9 adopting Exhibit S-194, we allow the Respondents to demonstrate additional payments made that may
10 offset the calculations of the Division. We specifically reject the Respondents’ summary, Exhibit C-
11 24. Instead we consider specific arguments made by the Respondents that may establish bases for
12 modification of amounts in Exhibit S-194, while allowing us to disapprove of those methodologies
13 applied by the Respondents that we find inappropriate.

14 The Respondents challenge the amount owed to Donald and Kathleen Hodel, investor number
15 50 on Exhibit S-194. The Respondents contend that the Hodels received uncredited payments
16 exceeding the \$35,953.09 of restitution requested on their behalf. The Division makes no contrary
17 assertion regarding these payments. We find that the Respondents have proven that the Hodels received
18 funds that were not reflected in Exhibit S-194. These funds exceed the requested restitution amount of
19 \$35,953.09. Accordingly, we disallow the restitution requested on behalf of the Hodels.

20 The Respondents further contend the existence of uncredited payments made to the Bachmann
21 Trust and the Schuringa Trust Account. Upon review of the documents cited for uncredited payment
22 of the Bachmann Trust, we find a total of 87 entries of payments totaling \$130,161.29.²⁰³⁵ Exhibit S-
23 194 does not list a Bachmann Trust, but the Division has credited repayments totaling \$135,177.13 to
24 investors Gregory and Lori Bachmann. The spreadsheets reflect separate payments to Jack

26
27 ²⁰³² *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, 267 ¶ 56, 92 P.3d 882, 897 (App. 2004).

²⁰³³ Tr. at 1072-1075.

²⁰³⁴ Tr. at 1028, 1033-1034, 1077, 1107, 1123-1125, 1140, 1224-1225.

²⁰³⁵ Exh. S-181 at ACC013076-ACC013077.

1 Schuringa²⁰³⁶ and the Schuringa Charitable Trust.²⁰³⁷ Exhibit S-194 does not list restitution being owed
2 to the Schuringa Charitable Trust, although Jack and Susan Schuringa are listed as being owed
3 \$1,308.46. We find that the Respondents have not established any modification is due to the restitution
4 totals of Exhibit S-194 based on payments to either the Bachmann Trust or the Schuringa Trust
5 Account.

6 The Respondents argue that the Division failed to offset gains on one account of investor Jack
7 Guest toward losses on another account. Exhibit S-194 shows one account for Jack W. Guest and
8 another account for the Guest Charitable Trust. While Mr. Guest may be involved in both accounts,
9 we find no basis to offset gains of the trust against losses of the individual. The Respondents further
10 assert that Exhibit S-194 fails to combine the Guest and Singleton family groups, however they state
11 no basis why those groups should be combined. The Respondents have not established a basis for
12 adjusting restitution as to the Guests or the Singletons.

13 The Respondents argue that restitution should be excluded for the Farmers, who are Mr.
14 Bersch's relatives, and Lisa Fuhrman, who also sold Concordia investments. The Division contends
15 these arguments are irrelevant and that they have prosecutorial discretion. We have acknowledged the
16 prosecutorial discretion of the division, *supra*. We find the Respondents have not established a basis
17 to exclude the Farmers or Ms. Fuhrman from an order for restitution.

18 We further dismiss the Respondents' arguments that a restitution order should be discounted to
19 reflect tax benefits or to account for the Second Amendment. Restitution offsets are allowed for
20 distributions received on a security.²⁰³⁸ The Respondents cite no authority to allow a reduction of
21 restitution for any tax benefits received. As the Division argues, the Second Amendments, which
22 reduced the investors' remaining principal by 55%, are contrary to A.R.S. § 44-2000 and, therefore,
23 are void.

24 We conclude that restitution has been established as owing to 58 investors in a total amount of
25 \$2,607,986.56, of which Mr. Bersch was the salesman for 27, totaling \$1,093,577.12, and Mr. Wanzek
26 was the salesman for 19, totaling \$946,111.35. As control persons of ER Financial, Mr. Bersch and

27 ²⁰³⁶ Exh. S-181 at ACC013121-ACC013123.

28 ²⁰³⁷ Exh. S-181 at ACC013255-ACC013259.

²⁰³⁸ A.A.C. R14-4-308(C)(1)(c).

1 Mr. Wancek are liable jointly and severally for its antifraud violations, pursuant to A.R.S. § 44-
2 1999(B). The Respondents argue that the Commission should use its discretion, pursuant to A.A.C.
3 R14-4-308(C)(5), to order a lesser amount of restitution. The Respondents have presented
4 uncontroverted evidence of their financial difficulty in complying with an order for full restitution. The
5 Respondents also argue that the investors were “[a]lmost universally, ... wealthy individuals” and that
6 the Division failed to prove that any were not accredited at the time of their purchases.²⁰³⁹

7 A modification of restitution under A.A.C. R14-4-308(C)(5) requires consideration of the
8 circumstances of both the respondents and the purchasers, with alternative restitution terms being
9 implemented only if necessary or appropriate to the public interest and consistent with the protection
10 of the investors. We have determined restitution is owed to fifty-eight investors, many of whom the
11 record contains no details of their financial circumstances. The record does not establish that ordering
12 alternative restitution terms would be necessary or appropriate to the public interest and consistent with
13 the protection of the investors. We find that full restitution is appropriate.

14 2. Administrative Penalties

15 The Division asserts that the Commission may assess an administrative penalty of up to \$5,000
16 for each violation of the Securities Act. The Division contends that Concordia, through the sale of 7
17 promissory notes and 132 investment contracts, committed 139 violations of A.R.S. § 44-1841 and 139
18 violations of A.R.S. § 44-1842. The Division recommends Concordia pay the maximum administrative
19 penalty of \$1,390,000. The Division contends that Mr. Bersch committed 63 violations each of A.R.S.
20 §§ 44-1841 and 44-1842, and recommends Mr. Bersch pay the maximum administrative penalty of
21 \$630,000. The Division states that Mr. Wanzek committed 53 violations each of A.R.S. §§ 44-1841
22 and 44-1842, and recommends Mr. Wanzek pay the maximum administrative penalty of \$530,000.
23 The Division argues that ER Financial committed 132 violations each of A.R.S. §§ 44-1841 and 44-
24 1842, and recommends ER Financial pay the maximum administrative penalty of \$1,320,000.

25 Additionally, the Division asserts that ER Financial committed 132 violations of A.R.S. § 44-
26 1991. For these violations, the Division recommends that ER Financial pay the maximum
27

28 ²⁰³⁹ Concordia Br. at 20.

1 administrative penalty of \$660,000. The Division contends that Mr. Bersch and Mr. Wanzek, as control
2 persons under A.R.S. § 44-1999(B), should be ordered to pay jointly and severally the administrative
3 penalty assessed against ER Financial for its violations of A.R.S. § 44-1991.

4 The parties have argued the presence of aggravating and mitigating factors for the Commission
5 to consider.

6 Under A.R.S. § 44-2036(A), the Commission has authority to assess an administrative penalty
7 of no more than \$5,000 for each violation committed.²⁰⁴⁰ The record establishes that Concordia
8 committed 139 violations of A.R.S. § 44-1841 and 139 violations of A.R.S. § 44-1842. As to
9 Concordia, we find the following significant aggravating factors: imposition of the Second Amendment
10 in an attempt to eliminate full repayment of investors' principal; elimination of the investors' collateral
11 through the request and receipt of the truck titles from ER Financial, in violation of the terms of the
12 Servicing Agreements and Custodial Agreements; the failure to supervise ER Financial's marketing of
13 the investment; and the high compensation Concordia paid to Mr. Crowder and Mr. Dekmejian. We
14 find the following significant mitigating factors: a lack of scienter that the investments were securities;
15 the financial condition of Concordia; most investors made a profit or broke even on the investment.
16 After weighing all the relevant factors, we find that substantial penalties are warranted against
17 Concordia. We find that a penalty of \$700,000 is appropriate for the registration violations committed
18 by Concordia.

19 The record establishes that ER Financial committed 132 violations each of A.R.S. §§ 44-1841
20 and 44-1842, Mr. Bersch committed 63 violations each of A.R.S. §§ 44-1841 and 44-1842, and Mr.
21 Wanzek committed 53 violations each of A.R.S. §§ 44-1841 and 44-1842. ER Financial further
22 committed violations of 132 violations of A.R.S. § 44-1991. As to the ER Respondents, we find the
23 following significant aggravating factors: terminating ER Financial and refusing to produce documents
24 in response to the Division's investigatory subpoena; elimination of the investors' collateral through
25 the return of the truck titles to ER Financial, in violation of the terms of the Servicing Agreements and
26

27 ²⁰⁴⁰ A.R.S. § 44-2036 provides, in pertinent part:

28 A. A person who, in an administrative action, is found to have violated any provision of this chapter or any rule or order of
the commission may be assessed an administrative penalty by the commission, after a hearing, in an amount of not to exceed
five thousand dollars for each violation.

1 Custodial Agreements; and the high compensation the ER Respondents received for their roles in the
 2 investments. We find the following significant mitigating factors: a lack of scienter that the
 3 investments were securities; a lack of scienter that the ER Respondents acted as unlicensed escrow
 4 agents pursuant to the Custodial Agreements; dismissal of some of the fraud allegations; the financial
 5 conditions of the ER Respondents; character evidence in favor of Mr. Bersch and Mr. Wanzek; and
 6 most investors made a profit or broke even on the investment. After weighing all the relevant factors,
 7 we find that substantial penalties are warranted against the ER Respondents. We find that the following
 8 penalties are appropriate for the registration violations committed by the ER Respondents: \$400,000
 9 for ER Financial, \$63,000 for Mr. Bersch, and \$53,000 for Mr. Wanzek. Additionally, we find that a
 10 penalty of \$300,000 is appropriate for the antifraud violations committed by ER Financial.

11 3. Cease and Desist

12 The Division requests that the Respondents be ordered to cease and desist from future violations
 13 of the Act, pursuant to A.R.S. § 44-2032. Concordia argues against the imposition of a cease and desist
 14 order. Concordia argues that the last sales occurred at the end of 2008, with Mr. Crowder attempting
 15 to end them sooner, seeking to instead bring in institutional investors. In support of its argument,
 16 Concordia quotes an unreported federal district court case: “Without a factual basis supporting a
 17 contention that a future violation is likely to occur, a permanent injunction is not an appropriate
 18 remedy.”²⁰⁴¹

19 In its Reply Brief, the Division argues that in 2010, Concordia sought to raise \$10 million from
 20 investors by misrepresenting that it had a “portfolio with stellar performance.”²⁰⁴² The Division
 21 contends that cease and desist orders are properly entered against respondents who have violated
 22 securities laws.²⁰⁴³ The Division argues that the Respondents sold 132 unlawful investment contracts
 23

24 ²⁰⁴¹ *S.E.C. v. Dunn*, No. 2:09-CV-2213 JCM VCF, 2012 WL 3096646, at *4, 2012 U.S. Dist. LEXIS 105462, at *11 (D. Nev. July 30, 2012).

25 ²⁰⁴² Exh. ER-15 at ACC011559, ACC011566.

26 ²⁰⁴³ Citing *Black Diamond Fund, LLLP v. Joseph*, 211 P.3d 727, 738 (Colo. App. 2009) (“Compliance with the [Colorado
 27 Securities Act] is necessarily in the public interest. ... We also find nothing arbitrary or capricious in the terms of a cease
 28 and desist order that mandates compliance with those laws”); *S.E.C. v. Alexander*, 115 F. Supp. 3d 1071, 1086 (N.D. Cal. 2015) (permanent injunction warranted against future violations of securities law because defendants’ actions were not isolated incidents, they never publicly acknowledged the wrongfulness of their conduct, and they provided no assurances against future violations); *S.E.C. v. Deyon*, 977 F. Supp. 510, 519 (D. Me. 1997) (permanent injunction warranted against future violations because defendants would not admit wrongful conduct).

over ten years and they refuse to acknowledge the wrongfulness of their conduct. The Division notes that "Concordia brazenly asserts 'it should be commended' for its unlawful conduct."²⁰⁴⁴

The Respondents violated the Act by the sale of 132 investment contracts over ten years and have demonstrated no recognition of the wrongful nature of their activities. We find the issuance of a cease and desist order against the Respondents would be consistent with the public interest and protection of investors.

* * * * *

Having considered the entire record herein and being fully advised in the premises, the Commission finds, concludes, and orders that:

FINDINGS OF FACT

1. Concordia Financing Company, Ltd., is a California corporation that was founded in 1994 by Kenneth Crowder.²⁰⁴⁵ Kenneth Crowder's son, Christopher Kenneth Crowder, joined Concordia in September 1999 and he has been the president of Concordia since 2006.²⁰⁴⁶ Concordia has not registered as a securities dealer or salesman with the Commission.²⁰⁴⁷

2. Lance Michael Bersch, CPA, has been licensed as a certified public accountant by the Arizona State Board of Accountancy since December 16, 1985.²⁰⁴⁸ Mr. Bersch has worked as an accountant in Lake Havasu, Arizona, from at least February 18, 1998, through at least December 2011.²⁰⁴⁹ Mr. Bersch served on Concordia's Board of Directors from February 4, 2000, until 2005.²⁰⁵⁰ Mr. Bersch has not registered as a securities dealer or salesman with the Commission.²⁰⁵¹ Mr. Bersch has never applied to be licensed as an escrow agent with the Arizona Department of Financial Institutions.²⁰⁵²

3. David John Wanzek, CPA, had been licensed as a certified public accountant by the

²⁰⁴⁴ Division Reply Br. at 83, quoting Concordia Br. at 83.

²⁰⁴⁵ Tr. at 70; Amended Notice at ¶ 10; Concordia's Amended Answer at ¶ 10; Exh. S-163 at 13, 16.

²⁰⁴⁶ Tr. at 66, 68, 93.

²⁰⁴⁷ Tr. at 69, 1220; Exh. S-1a.

²⁰⁴⁸ Amended Notice at ¶ 3; ER Respondents' Motion and Amended Answer at ¶ 3; Exh. S-178b.

²⁰⁴⁹ Amended Notice at ¶ 3; ER Respondents' Motion and Amended Answer at ¶ 3.

²⁰⁵⁰ Tr. at 1903; Exh. S-165 at ACC012139.

²⁰⁵¹ Tr. at 1220; Exh. S-1c.

²⁰⁵² Tr. at 1703, 1928.

1 Arizona State Board of Accountancy since April 17, 1995.²⁰⁵³ Mr. Wanzek had worked as an
 2 accountant in Lake Havasu, Arizona, from at least February 18, 1998, through at least March 2010.²⁰⁵⁴
 3 Mr. Wanzek served on Concordia's Board of Directors from February 4, 2000, until 2008.²⁰⁵⁵ Mr.
 4 Wanzek had not registered as a securities dealer or salesman with the Commission²⁰⁵⁶ Mr. Wanzek
 5 had never applied to be licensed as an escrow agent with the Arizona Department of Financial
 6 Institutions.²⁰⁵⁷

7 4. Linda Wanzek had been the spouse of Mr. Wanzek from at least February 18, 1998,
 8 through his death in 2018.²⁰⁵⁸ Linda Wanzek, as the putative personal representative of the estate of
 9 David Wanzek, has been substituted in place of the late Mr. Wanzek in this action.²⁰⁵⁹

10 5. David and Linda Wanzek lived in Lake Havasu City, Arizona, from 1990 until April
 11 2010, when they moved to Florida.²⁰⁶⁰

12 6. ER Financial & Advisory Services, LLC, was an Arizona limited liability company
 13 organized on October 9, 2001.²⁰⁶¹ ER Financial did business within or from the State of Arizona from
 14 that date until at least December 2011.²⁰⁶² ER Financial filed with the Commission its Articles of
 15 Termination on October 31, 2012.²⁰⁶³ The Commission issued to ER Financial a Certificate of
 16 Termination on November 5, 2012.²⁰⁶⁴ ER Financial had not registered as a securities dealer with the
 17 Commission.²⁰⁶⁵ ER Financial had never been licensed as an escrow business.²⁰⁶⁶

18 7. Management of ER Financial was reserved to its members.²⁰⁶⁷ Mr. Bersch and Mr.
 19

20 ²⁰⁵³ Amended Notice at ¶ 4; ER Respondents' Motion and Amended Answer at ¶ 4; Exh. S-178a.

²⁰⁵⁴ Amended Notice at ¶ 4; ER Respondents' Motion and Amended Answer at ¶ 4.

21 ²⁰⁵⁵ Tr. at 1637; Exh. S-165 at ACC012139.

²⁰⁵⁶ Tr. at 1220; Exh. S-1d.

22 ²⁰⁵⁷ Tr. at 1703.

²⁰⁵⁸ Amended Notice at ¶ 7; ER Respondents' Motion and Amended Answer at ¶ 7; *See Notice of Death of David Wanzek*,
 23 dated August 1, 2018; *Stipulated Motion to Substitute Linda Wanzek, in her Capacity as the Putative Personal*
 24 *Representative of the Estate of David Wanzek, in Place of the Late Respondent David Wanzek*, dated October 26, 2018, at
 2. ²⁰⁵⁹ Thirty-Third Procedural Order, dated October 30, 2018, at 20.

25 ²⁰⁶⁰ Tr. at 1588-1589.

²⁰⁶¹ Amended Notice at ¶ 5; ER Respondents' Motion and Amended Answer at ¶ 5; Exh. S-166.

26 ²⁰⁶² Amended Notice at ¶ 5; ER Respondents' Motion and Amended Answer at ¶ 5.

²⁰⁶³ Amended Notice at ¶ 5; ER Respondents' Motion and Amended Answer at ¶ 5; Exh. S-168.

27 ²⁰⁶⁴ *Id.*

²⁰⁶⁵ Tr. at 1220; Exh. S-1b.

28 ²⁰⁶⁶ Tr. at 1703, 1928.

²⁰⁶⁷ Exh. S-166.

1 Wanzek were the sole members of ER Financial.²⁰⁶⁸

2 8. From at least February 18, 1998, through at least October 9, 2001, when they formed
3 ER Financial, Mr. Bersch and Mr. Wanzek did business as “ER Financial and Advisory Service” with
4 respect to their sale of the securities at issue.²⁰⁶⁹

5 9. Concordia engaged in the business of purchasing and servicing contracts for the sale of
6 used “big rig” trucks (“Conditional Sales Contracts” or “Contracts”).²⁰⁷⁰ The Conditional Sales
7 Contracts were subprime loans financing the purchase of big rig trucks by truckers who were usually
8 first-time owner/operators with bad credit.²⁰⁷¹

9 10. Concordia sought investor capital to purchase more Conditional Sales Contracts.²⁰⁷²
10 Concordia raised capital by issuing promissory notes (“Promissory Notes”), and investment contracts
11 in the form of Servicing Agreements (“Servicing Agreements”) and accompanying Custodial
12 Agreements.²⁰⁷³ Each Custodial Agreement incorporated by reference “all terms and provisions” of
13 the associated Servicing Agreement.²⁰⁷⁴

14 11. Under the Conditional Sales Contracts, truckers typically paid thirty percent interest to
15 Concordia.²⁰⁷⁵ Concordia paid its investors between ten percent and twelve percent interest.²⁰⁷⁶

16 12. Concordia purchased Conditional Sales Contracts using investor money pooled with
17 revenue from truckers’ installment payments on their Conditional Sales Contracts, sales of repossessed
18 trucks, and insurance claims.²⁰⁷⁷ Concordia commingled investors’ funds with those from other
19 investors and Concordia’s profits in its bank account.²⁰⁷⁸ Concordia made interest payments to
20 investors using the pooled funds from the bank account.²⁰⁷⁹

21 13. Concordia sold Promissory Notes to Arizona residents in at least five transactions
22

23 ²⁰⁶⁸ Tr. at 1706; Exh. S-166.

24 ²⁰⁶⁹ Tr. at 1909-1910; Exhs. S-24b, S-41b, S-119b, S-123b, S-137b.

25 ²⁰⁷⁰ Tr. at 70; Amended Notice at ¶ 10; Concordia’s Amended Answer at ¶ 10; Exh. S-11e.

26 ²⁰⁷¹ Tr. at 115, 146.

27 ²⁰⁷² Amended Notice at ¶ 10; Concordia’s Amended Answer at ¶ 10; Exhs. S-11e, S-163 at 26-27.

28 ²⁰⁷³ Tr. at 77; Amended Notice at ¶ 10; Concordia’s Amended Answer at ¶ 10.

²⁰⁷⁴ See, e.g., Exh. S-12b at Recital A.

²⁰⁷⁵ Tr. at 147.

²⁰⁷⁶ Tr. at 147.

²⁰⁷⁷ Tr. at 96, 98-100; Exh. S-180 at 27-28, 43.

²⁰⁷⁸ Tr. at 98-102.

²⁰⁷⁹ Tr. at 100; Exh. S-165 at 52.

1 between September 10, 2002, and February 28, 2007.²⁰⁸⁰

2 14. Concordia sold another two Promissory Notes, on March 7, 2001, and May 7, 2005, to
3 an investor who directed Concordia, pursuant to other investment documents executed on those dates,
4 to send any communications to her address in Arizona.²⁰⁸¹

5 15. The Promissory Notes provided that Concordia would make monthly interest payments
6 over a two-year term in amounts that varied from approximately ten to twelve percent annually.²⁰⁸²
7 Upon expiration of the two-year term, Concordia promised to pay any unpaid interest and return any
8 unpaid principal.²⁰⁸³

9 16. Concordia's regular business practice was to deposit investor funds raised through
10 Promissory Notes into Concordia's account at Chino Commercial Bank, or its prior bank account,
11 before using those funds to purchase Conditional Sales Contracts.²⁰⁸⁴

12 17. Between 1998 and 2008, at least 132 investments were made in Concordia by investors
13 entering Servicing Agreements with Concordia and accompanying Custodial Agreements with
14 Concordia and ER Financial.²⁰⁸⁵

15 18. Pursuant to the Servicing Agreements, in exchange for the monetary investment,
16 Concordia agreed to sell, assign and transfer to the investor Conditional Sales Contracts from
17 Concordia's inventory thereof.²⁰⁸⁶ Investors had no control or input over which Conditional Sales
18 Contracts were assigned to them.²⁰⁸⁷

19 19. All of Concordia's Servicing Agreements and Custodial Agreements were substantially
20 identical except for those changes for the name of the investor, the amount of the investment, the date,
21 and the interest rate.²⁰⁸⁸ Under the terms of the Servicing Agreements, Concordia paid investors
22 monthly interest at an annual rate of twelve percent or ten percent, with the lower rate used for new
23

24 ²⁰⁸⁰ Amended Notice at ¶ 12; Concordia's Amended Answer at ¶ 12; Exhs. S-35e, S-35f, S-87e, S-103a, S-105a.

²⁰⁸¹ Exhs. S-115a, S-115b, S-115e, S-115f.

25 ²⁰⁸² Amended Notice at ¶ 13; Concordia's Amended Answer at ¶ 13; Exhs. S-35e, S-35f, S-87e, S-103a, S-105a, S-115e, S-115f.

²⁰⁸³ *Id.*

²⁰⁸⁴ Tr. at 79, 81, 83, 84, 87, 88-89, 98.

²⁰⁸⁵ See notes 790, 913, 914, *supra*.

27 ²⁰⁸⁶ See, e.g., Exh. S-12a at § 2; Exh. S-163 at 75, 80; Amended Notice at ¶ 14; Concordia's Amended Answer at ¶ 14.

²⁰⁸⁷ Tr. at 103.

28 ²⁰⁸⁸ Tr. at 1908-1909.

1 investments sold after January 2004.²⁰⁸⁹

2 20. The Servicing Agreements included a warranty to the investor that Concordia conducted
3 a credit check of the truck purchaser “to determine the payment risk.”²⁰⁹⁰ Proper credit checks were
4 important because if many truck purchasers defaulted, Concordia would not be able to collect on the
5 loans, and, in turn, Concordia would be unable to pay interest and principal to investors.²⁰⁹¹

6 21. Under Section 4.1 of the Servicing Agreements, Concordia was to deliver to ER
7 Financial, as the Custodian, “the originally executed Contracts and all evidences of title with respect
8 to the vehicles covered by the Contracts, with separate assignments executed by Concordia which effect
9 the assignment and transfer of the Contracts and title to the vehicles to Investor.”²⁰⁹² In spite of this
10 provision, the investors were not listed on the truck titles.²⁰⁹³ Instead, Concordia was listed as the
11 lienholder but signed the vehicle titles so that if Concordia defaulted and the Custodian released the
12 titles to the investors, the investors could put themselves as lienholders for the trucks by taking the
13 titles to the Department of Motor Vehicles.²⁰⁹⁴

14 22. Under the terms of the Servicing Agreements, if one of an investor’s Conditional Sales
15 Contracts went into default, Concordia would replace it by assigning and transferring to the investor a
16 “Substitute Contract” of equal or lesser principal balance than the defaulting Contract.²⁰⁹⁵ Concordia
17 would deliver the Substitute Contract to the Custodian, who would mail the defaulting Contract back
18 to Concordia.²⁰⁹⁶ The Custodian was to hold the Conditional Sales Contracts and vehicle titles that
19 Concordia assigned to an investor.²⁰⁹⁷ The Custodian was obligated to hold the assigned Conditional
20 Sales Contracts “for the benefit of Concordia and Investor.”²⁰⁹⁸

21 23. Under Section 4.1 of the Servicing Agreements, the Custodian would return a
22 Conditional Sales Contract to Concordia upon Concordia’s written representation to the Custodian and

23 ²⁰⁸⁹ Tr. at 147; *See, e.g.*, Exhs. S-2a, S-12a at §§ 6.2, 6.3; Amended Notice at ¶ 19; Concordia’s Amended Answer at ¶ 19;
24 Exh. S-163 at ACC012140.

²⁰⁹⁰ *See, e.g.*, Exh. S-12a at § 3.6.

²⁰⁹¹ Tr. at 115-117.

²⁰⁹² *See, e.g.*, Exh. S-12a at § 4.1.

²⁰⁹³ Tr. at 119.

²⁰⁹⁴ Tr. at 119, 136-137.

²⁰⁹⁵ *See, e.g.*, Exh. S-12a at §§ 1.10 and 3.7.

²⁰⁹⁶ *See, e.g.*, Exh. S-12a at § 3.7.

²⁰⁹⁷ *See, e.g.*, Exhs. S-12a at § 4.1, S-12b at § 4.1.

²⁰⁹⁸ *Id.*

1 the investor that the Contract “either (a) has been paid in full and must be returned to the [truck
 2 purchaser], or (b) has incurred a Contract Default and is to be concurrently replaced with a substitute
 3 Contract.”²⁰⁹⁹

4 24. Pursuant to Section 4.2 of the Servicing Agreements, if Concordia defaulted under the
 5 Servicing Agreement and failed to cure the default within 30 days, upon the investor’s instructions, the
 6 Custodian was obligated “to release to Investor the originally executed Contracts and all executed
 7 assignments then in the possession of the Custodian.”²¹⁰⁰

8 25. Section 4.3 of the Servicing Agreements provided:

9 Assuming no Default by Concordia under this Agreement, the Custodian
 10 shall continue to hold the originally executed Contracts and all executed
 11 assignments of title until the earlier of (a) receipt of written instructions
 12 signed by both Concordia and Investor providing for the disposition of
 13 such Contracts and assignments, [or] (b) the payment in full, and release
 14 of all the Contracts to Concordia for return to the [truck purchasers].²¹⁰¹

15 26. Under Section 6 of the Custodial Agreement, Concordia was to pay the Custodian, for
 16 its services, a monthly fee calculated as a percentage of the principal balance of the underlying
 17 investment.²¹⁰²

18 27. The Servicing Agreements vested authority in Concordia to service the Contracts,
 19 leaving no role for the investor in servicing the Contracts.²¹⁰³ The Servicing Agreements provided that
 20 unless Concordia defaulted and failed to cure the default within 30 days, the appointment of Concordia
 21 as servicing agent was “irrevocable and can be modified only with the prior written consent of
 22 Concordia, which consent may be withheld by Concordia for any reason whatsoever without regard to
 23 any standard of reasonableness.”²¹⁰⁴

24 28. The Servicing Agreements limited an investor’s ability to transfer his or her interest in
 25

26 ²⁰⁹⁹ See, e.g., Exh. S-12a at § 4.1.

27 ²¹⁰⁰ See, e.g., Exh. S-12a at § 4.2.

28 ²¹⁰¹ See, e.g., Exh. S-12a at § 4.3.

²¹⁰² See, e.g., Exh. S-12a at § 6.

²¹⁰³ Tr. at 132-133; See, e.g., Exh. S-12a at § 6.1.

²¹⁰⁴ Tr. at 134-136; See, e.g., Exh. S-12a at § 6.3.

1 the Contract by giving Concordia a 90-day right of first refusal to purchase the Contract at a price of
2 95 percent of the remaining principal owed to the investor.²¹⁰⁵

3 29. The Servicing Agreements included an investor acknowledgement of “the importance
4 of utilizing an experienced servicing agent” for the subprime Contracts and stated the investor agreed
5 that “(a) the requirement under this Agreement that Concordia be retained as the servicing agent during
6 the entire term of the Contracts is a material condition to Concordia’s willingness to enter this
7 Agreement, and (b) the servicing fees to be paid to Concordia hereunder are fair and reasonable.”²¹⁰⁶
8 This provision reflected the investor’s reliance upon Concordia’s efforts and experience as a servicing
9 agent to collect the amounts due on the truck’s financing contracts.²¹⁰⁷

10 30. The Servicing Agreements included a section wherein the investor grants to Concordia
11 “an irrevocable power of attorney, coupled with an interest, authorizing and permitting Concordia ...
12 to do any and all things Concordia deems necessary and proper to carry out the purpose(s) of this
13 Agreement.”²¹⁰⁸ Through this provision, investors delegated to Concordia all responsibility to service
14 the underlying Contracts.²¹⁰⁹

15 31. Section 12.8 of the Servicing Agreements provided that “This Agreement, and any
16 exhibits and schedules attached hereto, constitutes the entire agreement of the parties ... [and it] may
17 be amended only by written agreement executed by the parties.”²¹¹⁰

18 32. Prior to 2009, when Concordia stopped making interest payments to investors, if a
19 trucker defaulted on his or her Conditional Sales Contract, that default did not affect Concordia making
20 monthly interest payments to the investor to whom that Contract was assigned.²¹¹¹ Concordia made its
21 monthly interest payments to investors pursuant to the rate stated in the Servicing Agreements, not
22 pursuant to the performance of the assigned Conditional Sales Contracts.²¹¹²

23 33. Many of Concordia’s Servicing Agreements and Custodial Agreements were offered
24

25 ²¹⁰⁵ Tr. at 139-141; *See, e.g.*, Exh. S-12a at § 7.1.

²¹⁰⁶ Tr. at 151; *See, e.g.*, Exh. S-12a at § 8.

²¹⁰⁷ Tr. at 151-152.

²¹⁰⁸ Tr. at 152; *See, e.g.*, Exh. S-12a at § 12.1.

²¹⁰⁹ Tr. at 152-153.

²¹¹⁰ *See, e.g.*, Exh. S-12a at § 12.8.

²¹¹¹ Tr. at 167-169, 170-171; Exh. S-165 at 40, 51.

²¹¹² Tr. at 168; Exh. S-165 at 52.

1 and sold by Mr. Bersch or Mr. Wanzek, individually or through ER Financial.²¹¹³

2 34. Concordia paid finders' fees to persons who brought new investors to Concordia.²¹¹⁴
 3 After January 2004, Concordia set its finders' fees at a rate of five percent of the investment monies
 4 received.²¹¹⁵

5 35. From February 2004 through August 2008, ER Financial was the only person or entity
 6 to receive finders' fees from Concordia.²¹¹⁶ Concordia paid ER Financial \$565,424.58 in finders' fees
 7 during this period.²¹¹⁷

8 36. Concordia provided blank copies of Servicing Agreements and Custodial Agreements
 9 to Mr. Bersch and Mr. Wanzek so they could complete the documents with investors.²¹¹⁸ The
 10 salesperson for the investment would sign the Custodial Agreement on behalf of ER Financial.²¹¹⁹

11 37. Investors would provide their investment checks, payable to Concordia, to ER
 12 Financial.²¹²⁰ ER Financial would send the investors' checks to Concordia with the Servicing
 13 Agreements and Custodial Agreements.²¹²¹

14 38. Concordia neither supervised the marketing of its investments by Mr. Bersch, Mr.
 15 Wanzek, and ER Financial, nor requested to review the marketing materials and sales pitches they
 16 used.²¹²²

17 39. Concordia did nothing to determine if an investor had the financial wherewithal to make
 18 an investment and it did not use questionnaires or other materials to determine whether investors were
 19 accredited investors.²¹²³

20 40. Of the 132 Concordia investment contracts, Mr. Bersch signed the Custodial
 21 Agreements and was the salesman for 63.²¹²⁴ Mr. Wanzek signed the Custodial Agreements and was
 22

23 ²¹¹³ Tr. at 1721-1722; Exh. S-165 at 19-20.

²¹¹⁴ Exh. S-163 at 42-43.

24 ²¹¹⁵ Exh. C-7 at C000084.

²¹¹⁶ Exh. S-169 at ACC011404-ACC011408.

25 ²¹¹⁷ Exh. S-169 at ACC011404-ACC011408; Exh. S-194 at 2 of 3.

²¹¹⁸ Tr. at 95, 1909.

26 ²¹¹⁹ Tr. at 1321-1322.

²¹²⁰ Tr. at 96, 1655.

²¹²¹ Tr. at 96, 1655-1656.

27 ²¹²² Tr. at 93, 94, 129, 130.

²¹²³ Tr. at 96-97.

28 ²¹²⁴ See Tr. at 1321-1322. See also note 913, *supra*.

1 the salesman for 53 of the investment contracts.²¹²⁵ Sixteen Custodial Agreements were signed by an
 2 unidentified person on behalf of ER Financial.²¹²⁶

3 41. At least 12 investors in Concordia's Servicing Agreements and Custodial Agreements
 4 were told by Mr. Bersch or Mr. Wanzek, in selling the investment, that an investment in Concordia
 5 would be liquid or that the investor would be able to get his or her money back.²¹²⁷

6 42. In selling the Concordia investment to five investors, Mr. Bersch did not disclose that
 7 Concordia would pay him or ER Financial a commission or finder's fee if they invested.²¹²⁸ In selling
 8 the Concordia investment to Mr. Hatch, Mr. Wanzek did not disclose that Concordia would pay him
 9 or ER Financial a commission or finder's fee if he invested.²¹²⁹

10 43. By early 2009, Concordia could not afford to make interest payments to investors
 11 without jeopardizing its business.²¹³⁰ On March 6, 2009, Mr. Chris Crowder wrote to all the Concordia
 12 Servicing Agreement investors stating that Concordia will be amending the Servicing Agreements to
 13 state that interest would no longer be paid and future monthly payments would be classified as return
 14 of principal.²¹³¹

15 44. Concordia required its investors to approve an amendment to the Servicing Agreements
 16 (the "First Amendment") that would discontinue monthly interest payments and begin making monthly
 17 returns on principal.²¹³² Investors were not given an opportunity to negotiate the First Amendment.²¹³³
 18 Concordia threatened to, and did, withhold monthly payments to investors if they did not sign the First
 19 Amendment.²¹³⁴

20 45. Under the terms of the First Amendment, Sections 4.1, 4.2, and 4.3 of the Servicing
 21 Agreements remained in full force and effect.²¹³⁵

22
 23 ²¹²⁵ See Tr. at 1321-1322. See also note 790, *supra*.

24 ²¹²⁶ See note 914, *supra*.

25 ²¹²⁷ Tr. at 205 (Luhr), 419-420 (LeMay), 448-449 (Hatch), 498 (Dennison), 707 and 763 (Patricola), 1340 (Fuhrman), 1340-
 1341 (Hospice), 1350-1351 (McCowan), 1351-1352 (Martin), 1352 (Roth), 1353 (Bronsart), 1354 and 2300 (Peters), 1932.

26 ²¹²⁸ Tr. at 207 and 247 (Luhr), 272-273 (LeMay), 499-500 (Dennison), 708-709 (Patricola), 951 (Hodel).

27 ²¹²⁹ Tr. at 451.

28 ²¹³⁰ Exh. S-165 at 76; See, e.g., Exh. S-2c at Recital C.

²¹³¹ Tr. at 187; Exh. S-2i.

²¹³² Exh. S-165 at 36, 38, See, e.g., Exh. S-2c.

²¹³³ Tr. at 226, 297, 463, 514, 568.

²¹³⁴ Tr. at 299-302, 330, 516-517; Exhs. S-2k, S-2l.

²¹³⁵ See, e.g., Exh. S-2c.

1 46. In November 2010, Concordia instructed ER Financial to return the vehicle titles to
 2 it.²¹³⁶ Mr. Wanzek sent the vehicle titles back to Concordia although no investors had given written
 3 authorization to do so.²¹³⁷

4 47. In December 2011, Concordia required its investors to approve another amendment to
 5 the Servicing Agreements (the "Second Amendment").²¹³⁸ Under the terms of the Second Amendment,
 6 55% of the remaining principal owed to the investors was cancelled as "bad debt."²¹³⁹ Concordia was
 7 not willing to negotiate the Second Amendment with investors.²¹⁴⁰

8 48. From January 1, 1998, to March 10, 2015, the Respondents did not register securities
 9 with the Commission.²¹⁴¹

10 49. Concordia received more than \$26.6 million from investors through the sales of its
 11 Servicing Agreements, with accompanying Custodial Agreements, and Promissory Notes.²¹⁴²

12 50. From 2004 through January 2009, Concordia paid custodial fees to ER Financial
 13 totaling \$2,529,337.²¹⁴³

14 51. Fifty-eight Concordia investors who invested through Mr. Bersch, Mr. Wanzek, and ER
 15 Financial have not been repaid \$2,607,986.56 of the principal they invested.²¹⁴⁴ Of those fifty-eight
 16 Concordia investors, Mr. Bersch acted as the salesman for twenty-seven, who are owed
 17 \$1,093,577.12.²¹⁴⁵ Mr. Wanzek acted as the salesman for nineteen of those investors, who are owed
 18 \$946,111.35.²¹⁴⁶ Twelve investors in Concordia who invested through ER Financial, without the
 19 record establishing a specific salesman, are owed \$568,298.09.²¹⁴⁷

20 52. These findings of fact are based upon the Discussion above, and those findings are also
 21 incorporated herein.

22 _____
 23 ²¹³⁶ Exh. S-161 at ¶ 4.

²¹³⁷ Tr. at 600, 1697; Exh. S-161 at ¶ 4.

24 ²¹³⁸ See, e.g., Exh. S-2d.

²¹³⁹ Tr. at 908-909; See, e.g., Exh. S-2d.

25 ²¹⁴⁰ Tr. at 591.

²¹⁴¹ Tr. at 777, 1602; Exhs. S-1a, S-1b.

26 ²¹⁴² Exh. S-194.

²¹⁴³ Exh. S-169 at ACC011409-ACC011410.

27 ²¹⁴⁴ Tr. at 973-974, 981, 1014; Exh. S-194.

²¹⁴⁵ Id.

28 ²¹⁴⁶ Exh. S-194.

²¹⁴⁷ Id.

CONCLUSIONS OF LAW

1 1. The Commission has jurisdiction of this matter pursuant to Article XV of the Arizona
2 Constitution and A.R.S. § 44-1801, *et. seq.*

3 2. The findings contained in the Discussion above are incorporated herein.

4 3. Within or from Arizona, Respondents Concordia, ER Financial, Lance Michael Bersch,
5 and David John Wanzek offered and sold securities, within the meaning of A.R.S. § 44-1801.

6 4. The Respondents failed to meet their burden of proof pursuant to A.R.S. § 44-2033 to
7 establish that the securities offered and sold herein were exempt from regulation under the Act.

8 5. Respondents Concordia, ER Financial, Lance Michael Bersch, and David John Wanzek
9 violated A.R.S. § 44-1841 by offering and selling securities that were neither registered nor exempt
10 from registration.

11 6. Respondents Concordia, ER Financial, Lance Michael Bersch, and David John Wanzek
12 violated A.R.S. § 44-1842 by offering and selling securities while not being registered as dealers or
13 salesmen.

14 7. Respondents ER Financial, Lance Michael Bersch, and David John Wanzek committed
15 fraud in the offer and sale of securities, in violation of A.R.S. § 44-1991, in the manner set forth
16 hereinabove.

17 8. Respondents Lance Michael Bersch and David John Wanzek directly or indirectly
18 controlled ER Financial, within the meaning of A.R.S. § 44-1999, and are jointly and severally liable
19 with ER Financial, for violations of A.R.S. § 44-1991.

20 9. Respondents Concordia's, ER Financial's, Lance Michael Bersch's, and David John
21 Wanzek's conduct is grounds for a cease and desist order pursuant to A.R.S. § 44-2032.

22 10. Respondents Concordia's, ER Financial's, Lance Michael Bersch's, and David John
23 Wanzek's conduct is grounds for an order of restitution pursuant to A.R.S. § 44-2032 and A.A.C. R14-
24 4-308, and for which the marital community of David John Wanzek and Linda Wanzek should be
25 jointly and severally liable subject to the limitations of A.R.S. § 25-215.

26 11. Respondents Concordia's, ER Financial's, Lance Michael Bersch's, and David John
27 Wanzek's conduct is grounds to order administrative penalties pursuant to A.R.S. § 44-2036, and for
28

1 which the marital community of David John Wanzek and Linda Wanzek should be jointly and severally
2 liable subject to the limitations of A.R.S. § 25-215.

3 **ORDER**

4 IT IS THEREFORE ORDERED that pursuant to the authority granted to the Commission under
5 A.R.S. § 44-2032, Respondent Concordia, shall cease and desist from its actions, as described above,
6 in violation of A.R.S. §§ 44-1841 and 44-1842.

7 IT IS FURTHER ORDERED that pursuant to the authority granted to the Commission under
8 A.R.S. § 44-2032, Respondents ER Financial and Lance Michael Bersch shall cease and desist from
9 their actions, as described above, in violation of A.R.S. §§ 44-1841, 44-1842 and 44-1991.

10 IT IS FURTHER ORDERED that pursuant to the authority granted to the Commission under
11 A.R.S. § 44-2032, Respondents Concordia and ER Financial, jointly and severally, shall make
12 restitution in the amount of \$2,607,986.56, payable to the Arizona Corporation Commission within 90
13 days of the effective date of this Decision. Such restitution shall be made pursuant to A.A.C. R14-4-
14 308 subject to legal setoffs by the Respondents and confirmed by the Director of Securities.

15 IT IS FURTHER ORDERED that pursuant to the authority granted to the Commission under
16 A.R.S. § 44-2032, Respondents Lance Michael Bersch and Linda Wanzek, individually as the putative
17 personal representative for the estate of David John Wanzek, and to the extent allowable pursuant to
18 A.R.S. § 25-215, the marital community of David John Wanzek and Linda Wanzek, jointly and
19 severally with Respondents Concordia and ER Financial, shall make restitution in the amount of
20 \$2,607,986.56, payable to the Arizona Corporation Commission within 90 days of the effective date of
21 this Decision. Such restitution shall be made pursuant to A.A.C. R14-4-308 subject to legal setoffs by
22 the Respondents and confirmed by the Director of Securities.

23 IT IS FURTHER ORDERED that all ordered restitution payments shall be deposited into an
24 interest-bearing account(s), if appropriate, until distributions are made.

25 IT IS FURTHER ORDERED that the ordered restitution shall bear interest at the rate of the
26 lesser of 10 percent *per annum*, or at a rate *per annum* that is equal to one percent plus the prime rate
27 as published by the Board of Governors of the Federal Reserve System of Statistical Release H.15, or
28 any publication that may supersede it on the date that the judgment is entered.

1 IT IS FURTHER ORDERED that the Commission shall disburse the restitution funds on a *pro*
2 *rata* basis to the investors shown on the records of the Commission. Any restitution funds that the
3 Commission cannot disburse to an investor because the investor is deceased or an entity which invested
4 is dissolved, shall be disbursed on a *pro rata* basis to the remaining investors shown on the records of
5 the Commission. Any remaining funds that the Commission determines it is unable to or cannot
6 feasibly disburse shall be transferred to the general fund of the State of Arizona.

7 IT IS FURTHER ORDERED that Respondent Concordia shall pay to the State of Arizona
8 administrative penalties in the amount of \$700,000 for Concordia's multiple violations of the
9 registration provisions of the Securities Act, pursuant to A.R.S. § 44-2036. Said administrative
10 penalties shall be payable by either cashier's check or money order payable to "the State of Arizona"
11 and presented to the Arizona Corporation Commission for deposit in the general fund for the State of
12 Arizona.

13 IT IS FURTHER ORDERED that Respondent ER Financial shall pay to the State of Arizona
14 administrative penalties in the amounts of \$400,000 for violations of the registration provisions of the
15 Securities Act, and \$300,000 for violations of the antifraud provisions of the Securities Act, pursuant
16 to A.R.S. § 44-2036. Said administrative penalties shall be payable by either cashier's check or money
17 order payable to "the State of Arizona" and presented to the Arizona Corporation Commission for
18 deposit in the general fund for the State of Arizona.

19 IT IS FURTHER ORDERED that Respondent Lance Michael Bersch shall pay to the State of
20 Arizona administrative penalties in the amount of \$63,000 for his multiple violations of the registration
21 provisions of the Securities Act, pursuant to A.R.S. § 44-2036. Said administrative penalties shall be
22 payable by either cashier's check or money order payable to "the State of Arizona" and presented to
23 the Arizona Corporation Commission for deposit in the general fund for the State of Arizona.

24 IT IS FURTHER ORDERED that Respondent Linda Wanzek, individually as the putative
25 personal representative for the estate of David John Wanzek, and to the extent allowable pursuant to
26 A.R.S. § 25-215, the marital community of David John Wanzek and Linda Wanzek, shall pay to the
27 State of Arizona administrative penalties in the amount of \$53,000 for David John Wanzek's multiple
28 violations of the registration provisions of the Securities Act, pursuant to A.R.S. § 44-2036. Said

1 administrative penalties shall be payable by either cashier's check or money order payable to "the State
2 of Arizona" and presented to the Arizona Corporation Commission for deposit in the general fund for
3 the State of Arizona.

4 IT IS FURTHER ORDERED that Respondents Lance Michael Bersch, individually, and Linda
5 Wanzek, individually as the putative personal representative for the estate of David John Wanzek, and
6 to the extent allowable pursuant to A.R.S. § 25-215, the marital community of David John Wanzek and
7 Linda Wanzek, jointly and severally with ER Financial, shall pay to the State of Arizona administrative
8 penalties in the amount of \$300,000 for ER Financial's multiple violations of the antifraud provisions
9 of the Securities Act, pursuant to A.R.S. §§ 44-2036 and 25-215. Said administrative penalties shall
10 be payable by either cashier's check or money order payable to "the State of Arizona" and presented
11 to the Arizona Corporation Commission for deposit in the general fund for the State of Arizona

12 IT IS FURTHER ORDERED that the payment obligations for these administrative penalties
13 shall be subordinate to the restitution obligations ordered herein and shall become immediately due and
14 payable only after restitution payments have been paid in full or upon Respondents' default with respect
15 to Respondents' restitution obligations.

16 IT IS FURTHER ORDERED that if Respondents fail to pay the administrative penalties
17 ordered hereinabove, any outstanding balance plus interest, at the rate of the lesser of ten percent *per*
18 *annum* or at a rate *per annum* that is equal to one percent plus the prime rate as published by the Board
19 of Governors of the Federal Reserve System in Statistical Release H.15 or any publication that may
20 supersede it on the date that the judgment is entered, may be deemed in default and shall be immediately
21 due and payable, without further notice.

22 IT IS FURTHER ORDERED that if any of the Respondents fail to comply with this Order, any
23 outstanding balance shall be in default and shall be immediately due and payable without notice or
24 demand. The acceptance of any partial or late payment by the Commission is not a waiver of default
25 by the Commission.

26 IT IS FURTHER ORDERED that default shall render Respondents liable to the Commission
27 for its cost of collection and interest at the maximum legal rate.

28 IT IS FURTHER ORDERED that if any of the Respondents fail to comply with this Order, the

Commission may bring further legal proceedings against the Respondent(s) including application to the Superior Court for an order of contempt.

IT IS FURTHER ORDERED that pursuant to A.R.S. § 44-1974, upon application the Commission may grant a rehearing of this Order. The application must be received by the Commission at its offices within twenty (20) calendar days after entry of this Order. Unless otherwise ordered, filing an application for rehearing does not stay this Order. If the Commission does not grant a rehearing within twenty (20) calendar days after filing the application, the application is considered to be denied. No additional notice will be given of such denial.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

RECUSED

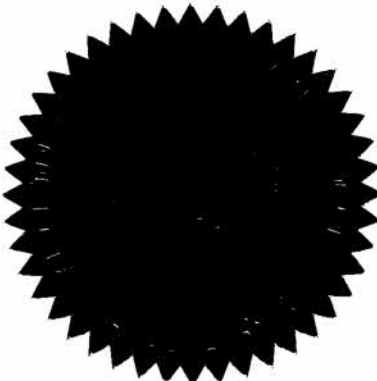
CHAIRMAN BURNS

COMMISSIONER DUNN

COMMISSIONER TOBIN

COMMISSIONER KENNEDY

COMMISSIONER OLSON



IN WITNESS WHEREOF, I, MATTHEW J. NEUBERT, Executive Director of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this 20 day of February 2019.

MJN
MATTHEW J. NEUBERT
EXECUTIVE DIRECTOR

DISSENT _____

DISSENT _____
MP/sa(gb)

SERVICE LIST FOR:

CONCORDIA FINANCING COMPANY, LTD, a/k/a
"CONCORDIA FINANCE,"
ER FINANCIAL & ADVISORY SERVICES, LLC,
LANCE MICHAEL BERSCH, and
DAVID JOHN WANZEK and LINDA WANZEK

DOCKET NO.:

S-20906A-14-0063

Adam E. Lang
SNELL & WILMER LLP
One Arizona Center
400 East Van Buren
Phoenix, AZ 85004
Attorney for Respondents ER,
Lance Michael Bersch, and Linda Wanzek
alang@swlaw.com
jhoward@swlaw.com
cpaulsen@swlaw.com
docket@swlaw.com

Consented to Service by Email

Alan S. Baskin
David Wood
BASKIN RICHARDS PLC
2901 North Central Avenue, Suite 1150
Phoenix, AZ 85012
Attorneys for Respondent Concordia

Mark Dinell, Acting Director
Securities Division
ARIZONA CORPORATION COMMISSION
1300 West Washington Street
Phoenix, AZ 85007
SecDivServicebyEmail@azcc.gov
JBurgess@azcc.gov
WCoy@azcc.gov
KH@azcc.gov

Consented to Service by Email